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NO.

IN THE

SUPREME COURT OF THE

UNITED STATES

October 1991 Term

GRAND TRUNK WESTERN RAILROAD COMPANY,

a Michigan Corporation,

Respondent,

v

CITY OF FENTON,

a Michigan Municipal Corporation,

Petitioner.

PETITION FOR WRIT OF CERTIORARI

TO THE MICHIGAN SUPREME COURT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. MAY A CITY ADOPT A FREIGHT TRAIN SPEED LAW THAT IS SLOWER THAN A FEDERALLY SET SPEED LIMIT, TO PROTECT ORDINARY CITIZENS AT A CROWDED INTERSECTION, WHEN THE CITY COUNCIL HAS DETERMINED THAT THE SLOWER SPEED LIMIT IS SAFER AND THE FEDERAL RULE IS ONLY AN INITIAL MINIMUM SAFETY REQUIREMENT?

2. MAY A CITY ADOPT A FREIGHT TRAIN SPEED LAW FOR AN INTERSECTION WHERE TWELVE PERSONS HAVE DIED, WHEN THE CITY COUNCIL HAS DETERMINED THAT A SLOWER SPEED LIMIT THAN THE FEDERALLY SET LIMIT IS NECESSARY TO ELIMINATE OR REDUCE ESSENTIALLY LOCAL SAFETY HAZARD?

QUESTIONS PRESENTED - CONTINUED

3. DO THE PRINCIPLES OF LAW AS SET OUT BY THE U.S. SUPREME COURT IN WISCONSIN PUBLIC INTERVENOR v MORTIER, 111 SUP. CT. 2476 (1991) SO CONFLICT WITH THE MICHIGAN SUPREME COURT'S OPINION IN GRAND TRUNK WESTERN RAILROAD v CITY OF FENTON, 439 MICH 240 (1992) AS TO REQUIRE A REVERSAL OF THE MICHIGAN SUPREME COURT?

LIST OF ALL PARTIES TO THE PROCEEDING IN THE COURT WHOSE JUDGMENT IS SOUGHT TO BE REVIEWED

Grand Trunk Western Railroad Company[1]

City of Fenton[2]

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[1] Canadian National Railway Company is a Canadian Corporation, the parent company for Grand Trunk Corporation, a Michigan Corporation. The Plaintiff-Appellee, Grand Trunk Western Railroad Company is a wholly owned subsidiary of Grand Trunk Corporation. Grand Trunk Corporation has no subsidiaries.

[2] City of Fenton is a Michigan Municipal Corporation and it has no parent corporation and no subsidiaries.

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PRIOR OPINIONS IN THIS CASE

The Michigan Supreme Court decided this case on March 27, 1992 and its Opinion is reported in 439 Mich 240 and reproduced in the Appendix to this Petition for Writ of Certiorari. The decision of the Michigan Supreme Court was a review of a decision of the Michigan Court of Appeals and the Michigan Court of Appeals Opinion is reproduced in the Appendix to this Writ of Certiorari.

There were an Opinion and an Order of the Genesee County Circuit Court in the State of Michigan which are pertinent to this Writ of Certiorari. They were not published. They are reproduced in the Appendix and are identified by title and date in the Index to the Appendix.

GROUNDS ON WHICH THE JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES IS INVOKED

The date of entry of the judgment or decree of the Michigan Supreme Court that is sought to be reviewed is March 27, 1992.

There has been no order respecting a rehearing and there has been no order granting an extension of time within which to file a petition for a writ of certiorari.

The statutory provision believed to confer on this Court jurisdiction to review the judgment or decree in question by writ of certiorari is 28 USC § 1257 (a).

CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES, ORDINANCES AND REGULATIONS INVOLVED IN THE CASE

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CONCISE STATEMENT OF THE CASE

In 1987, the Grand Trunk Western Railway Company (Grand Trunk) filed an action in Circuit Court requesting an injunction restraining the City of Fenton from enforcing a train speed ordinance that the Fenton City Council had adopted in 1986 and requesting that the Circuit Court declare the ordinance to be violative of the Constitution and laws of the United States.

The federal questions sought to be reviewed were raised in the Complaint filed in Genesee County Circuit Court by Respondent on February 26, 1987. The Respondent claimed in the "First Claim for Relief" of the Complaint, that the Fenton Train Speed Ordinance was preempted and violative of Supremacy Clause of the United States Constitution, US Const, art 6, Cl 2. In it's "Second Claim for Relief" of the Complaint, the Respondent raised the assertion that the Fenton Train

Speed Ordinance was violative of the Commerce Clause, US Const, art 1, §8, cl 3. A copy of the Complaint filed in the Genesee County Circuit Court for the State of Michigan is found in the Appendix. The Petitioner denied the allegations in its Answer to Complaint by pointing out in paragraphs 16 through 22 of the Answer to Complaint that Congress did not intend to preempt states from delegating to cities the authority to control the surface of its streets and the vehicles and trains that traverse them. The Petitioner then argued that the reason that the Supremacy Clause was not violated was that the power Congress gave to "States" in 45 USC 434 had been delegated to cities by the Home Rule Cities Act. The Petitioner argued that the reason that the Commerce Clause was not violated was because this Court said that a city train speed does not violate interstate commerce, to wit:

"Such act is, even as to interstate

one only indirectly affecting interstate commerce..." Erb v Morasch, 177 US 584, 44 L Ed 897, 20 S Ct 819 (1900) page 586.

On April 4, 1989, the Circuit Court, following a Motion for Summary Judgment, entered an Order permanently enjoining the City of Fenton from the enforcement of its train speed ordinance, dismissing all train speed tickets and declaring the ordinance to be violative of the United States Constitution and laws.

The City of Fenton appealed the Order to the Michigan Court of Appeals and that lower court upheld the Circuit Court's finding that the ordinance violated the Supremacy Clause. (Opinion of the Court of Appeals, Appendix page 1a.)

The City of Fenton requested leave to appeal to the Michigan Supreme Court and that Court granted leave to appeal on July 8, 1991. The Michigan Supreme Court held:

"...despite our sympathy for the genuine safety concerns that motivated the adoption of Fenton's train speed ordinance, we are compelled to find that Ordinance preempted and void under the Supremacy Clause, US Const, art VI, cl 2. (Opinion of the Michigan Supreme Court, decided March 27, 1992, Appendix page 1a.)

FACTS CONCERNING ESSENTIALLY LOCAL SAFETY HAZARD

The City of Fenton has been severely harmed by an essentially local safety hazard existing at the North Leroy Street crossing within the city limits.

Since October 11, 1964, there have been ten (10) separate train-vehicle collisions at the junction of North Leroy Street and the railroad tracks. Twelve (12) persons have died at this safety hazard.

These twelve (12) persons died during a twenty-six (26) year time period at one railroad crossing. In addition, there were four (4) personal injuries.

Grand Trunk does not refute the fact that twelve (12) persons died at the North Leroy Street crossing or that North Leroy Street is a city street and not a county or state road and that approximately thirteen (13) trains travel through Fenton daily.

In addition, the North Leroy Street crossing is very heavily traveled and 17,126 cars were observed crossing the railroad tracks on February 10, 1981.

The City of Fenton maintains that the North Leroy Street crossing is "an essentially local safety hazard" within the meaning of 45 USC 434.

FACTS CONCERNING TRAIN SPEED AND SAFETY

The U.S. Department of Transportation Federal Railroad Administration Office of Safety, published in June of 1986, a study

entitled Rail-Highway Crossing Accident/ Incident and Inventory Bulletin (App p 103a) This document has been admitted into evidence at the deposition of Mayor Carl S. Hammond, on October 12, 1987 (App p 182a)

Table 1 of the Bulletin points out that in the year 1985, there were "6,353" accidents at rail-highway crossings and the "537" persons were killed. (App p 106a).

In addition, Table 18 sets out the number of persons killed by freight trains. Grand Trunk is a freight train and no passenger trains run through the City of Fenton. When freight trains in the U.S. traveled at 40-49 miles per hour "138" persons were killed. Whereas, when freight trains traveled 20-25 miles per hour "43" persons were killed. Over three times as many people were killed with trains traveling at the speed Grand Trunk

wants to travel across the North Leroy Street crossing in the City of Fenton (50 miles per hour), than the speed the Fenton City Council wants for the trains to travel (25 miles per hour).

Table 55 is particularly enlightening. It demonstrates that trains traveling at fifty (50) miles per hour are much more likely to kill persons than trains traveling at twenty five (25) miles per hour. The total crossings by trains by maximum timetable speed of 46-50 miles per hour was "17,601". The total crossings at timetable speed of 21-25 miles per hour was "22,301".

This means that fewer trains travel over crossings at the higher speed yet 95 more people were killed. It is not a statistical fluke that over three times as many persons were killed by freight trains at 40-49 than at 20-25 miles per hour.

Trains traveling at fifty

(50) miles per hour are much more likely to kill persons than trains traveling at twenty-five (25) miles per hour.

FACTS CONCERNING LEGISLATIVE INTENT

While legislative intent is the ultimate question of this litigation and will be discussed in the legal argument section of this Brief, it is important to note that the legislature of the State of Michigan clearly intended that cities be allowed to set train speed limits within their boundaries.

The House Legislative Analysis Section published a position paper that said:

> "Michigan law allows municipalities ...to set train speed limits within their boundaries." House Legislative Analysis, App. pg. 112a

FACTS OF NONACTION BY THE SECRETARY OF TRANSPORTATION CONCERNING TRAIN SPEED RULES

While questions concerning statutes and cases are clearly questions of law,

questions concerning the existence or non-existence of rules, regulations, orders and standards promulgated by an Administrative Agency often become questions of fact for the simple reason that only administrators have ready access to the myriad of rules, regulations, orders and standards promulgated by such administrative agencies.

In the instant case, I called upon the expertise of Clarence E. Magoon, the Special Assistant to the Administrator of Railway Safety and Tariff Division of the Michigan Department of Transportation to determine whether or not the Federal Secretary of Transportation had enacted train speed regulations concerning the subject-matter of safe train speeds in congested areas.

Despite Grand Trunk's claim that the Secretary of Transportation has regulated the subject matter of safe train speeds in congested areas, Mr. Magoon has refuted

that claim in an affidavit (Appendix p. 118a).

To date, the Secretary of Transportation of the Federal Government has not promulgated train speed regulations that concern the subject matter of safe train speeds in congested areas. The Secretary has only adopted regulations found in 49 CFR Ch. 11, Section 213.1, et al. These regulations concern only the maximum safe operating speeds of trains as to "specific track conditions existing in isolation." 49 CFR 213.1. Further, the Code of Federal Regulations provides "This part prescribes initial minimum safety requirements..." 49 CFR 213.1. Since the Secretary of Transportation adopted a train speed limit with only initial minimum safety requirements, it is clear that the Secretary of Transportation intended that these requirements would be modified by the "State" within the meaning of 45 USC 434.

The question of whether or not the train speed limits adopted by the Secretary of Transportation were designed to stop derailments or to lessen the number of grade crossing incidents is ultimately a question of law. Committee Reports or bureaucratic determinations are simply not a reliable indicator of intent. In telling us that "This part prescribed initial minimum safety requirements...", 49 CFR 213.1, the Secretary of Transportation is manifesting his intent in writing for us. He tells us that his speed limits are only the beginning and that he expects them to be changed. The Secretary of Transportation also makes it clear that the train speed limits are only for "...specific track conditions in isolation." (49 CFR 213.1). This language indicates that the Secretary intended his speed limits to be for tracks that exist away from crowds of people and he fully expected that slower train speeds

would be enacted by the "State" within the meaning of 45 USC 434 to protect human life in crowded or congested areas.

If courts are waiting for a legislative history to emerge from the actions of the Secretary of Transportation, the wait will indeed be a long one because the Secretary of Transportation is part of the executive branch of government and does not and cannot legislate.

At the risk of using common sense instead of following Mark Twain's admonishment of what the law is...I suggest to this Honorable Court that the Congress of the United States wanted to make freight train crossings safer when they enacted the Federal Railway Safety Act. The Secretary of Transportation recognized that his analysis of safety in freight train speeds would involve factors other than just the physical properties of a safe train track so he established our initial minimum standards.

DIRECT AND CONCISE ARGUMENT AMPLIFYING THE REASONS RELIED UPON THE FOR ALLOWANCE OF THE WRIT

ISSUE 1. MAY A CITY ADOPT A FREIGHT TRAIN SPEED LAW THAT IS SLOWER THAN A FEDERALLY SET SPEED LIMIT, TO PROTECT ORDINARY CITIZENS AT A CROWDED INTERSECTION, WHEN THE CITY COUNCIL HAS DETERMINED THAT THE SLOWER SPEED LIMIT IS SAFER AND THE FEDERAL RULE IS ONLY AN INITIAL MINIMUM SAFETY REQUIREMENT?

The Commerce Clause of the United States Constitution gives Congress the power:

> "To regulate Commerce with foreign Nations, and among the several States..." US Const, Art 1, Sec 8.

The power of municipalities to regulate train speeds, notwithstanding the commerce clause, has been recognized since the landmark decision of Erb v Morasch, 177 US 584; 20 S Ct 819; 44 L Ed 897

(1900). The facts of Erb v Morasch, are as follows:

> "In September, 1888, the city council of Kansas City passed an ordinance regulating the running of railroad tracks through the city." Section 8 of the Kansas City Ordinance is the only one material to the present controversy. That law reads as follows:
>
> "Sec. 2. It shall be unlawful for any such engineer, conductor, or other person having a railway engine or train cars in charge to permit the same to be run in said city at a greater speed than six (6) miles per hour." Erb v Morasch, p 898 (1900).

Seventy years after the Supreme Court spoke in Erb v Morasch, the Congress of the United States passed the Federal

Railway Safety Act. That federal statute provides in pertinent part:

> "The Congress declares that laws, rules, regulations, orders and standards relating to railroad safety shall be nationally uniform to the extent practicable. A State may adopt or continue in force any law, rule, regulation, order or standard relating to railroad safety until such time as the Secretary has adopted a rule, regulation, order, or standard covering the subject matter of such state requirement. A State may adopt or continue in force, an additional or more stringent law, rule, regulation, order or standard relating to railroad safety when necessary to eliminate or reduce an essentially local safety hazard, and when not incompatible with any Federal law, rule, regulation, order or standard, and when not creating an undue burden on interstate commerce." 45 USC 434.

Let us examine this statute, line by line, to determine its meaning.

In reading the first sentence of the statute, it appears that Congress intended to make laws, rules, regulations, orders, and standards relating to railroad safety uniform; but only **"to the extent practicable"**. This language clearly indicates that a total preemption of railroad safety was not intended by Congress. If a total preemption were intended, Congress would not have added the limiting words **"to the extent practicable"**.

An examination of the second sentence will reveal the first exception to preemption. Congress allowed that **"A State...may continue in force any law...**relating to railroad safety until such time as the Secretary has adopted a rule, regulation, order or standard

covering the subject matter of such state requirement."

The words in the statute "covering the subject matter of the state requirement" are terms of art in the law and have a special meaning. The Michigan Supreme Court in Huron Portland Cement Company v City of Detroit, 355 Mich 227 (1959), examined these words and came to a conclusion that supports the Petitioner City of Fenton's legal position.

In Huron Portland Cement Company v City of Detroit, the highest court in the State of Michigan was called upon to determine if an ordinance in the City of Detroit regulating pollution conflicted with existing federal legislation. To find the answer, the Michigan Supreme Court set out the following test: "...we must look at the scope and intent of the congressional legislation and then examine the ordinance in question to see if it pertains to the **same subject matter.**"

Huron v Detroit, page 231, bottom of page and continuing into first paragraph on page 232.

The federal regulation that was ultimately adopted by the Secretary of Transportation provides as follows:

> "This part prescribes initial **minimum safety requirements** for railroad track that is part of the general railroad system of transportation. The requirements prescribed in this part apply to specific track conditions existing in **isolation**." 49 CFR 213.1

It follows that the Secretary of Transportation intended its rules concerning trains speeds to be only minimum rules and then only for track conditions existing in "isolation".

None of the Federal legislation in this field is designed or enacted for the protection of persons in congested cities. It appears that the Secretary of Transportation is saying that the minimum speed of trains is, for example, sixty (60) miles per hour for Class 3 track; but that minimum speed is for a train track existing in isolation. It follows that the City of Fenton's ordinance and the Federal legislation deal with basically different subject matters and are, thus, not in such conflict that the former must bow.

The subject matter of the City's freight train speed ordinance is safe freight train speeds in congested areas and the subject matter of the Code of Federal Regulations, 49 CFR 213.9, is safe train speeds for tracks existing in isolation.

It seems clear that the CFR dealing with trains speeds has to do with how fast trains may safely travel without derailing.

The pertinent regulation is found in Title 49 Transportation, Chapter II Federal Railroad Administration of the Code of Federal Regulations and it deals exclusively with the speeds trains can safely travel on different classes of track. 49 CFR 213.9 states:

> "(a) Except as provided in paragraph (b) and (c) of this section and 213.57 (b), 213.59 (a), and 213.37 (b), the following maximum allowable operating speeds apply:

(In Miles Per Hour)

Over track meets all of the requirements prescribed in this part for -	Maximum allowable operating speed for freight trains is	Maximum allowable operating speed for passenger trains is
Class 1 track	10	15
Class 2 track	25	30
Class 3 track	40	60
Class 4 track	60	80
Class 5 track	80	90
Class 6 track	110	110

The Code of Federal Regulations goes on in Subpart C-Track Geometry to set out the requirements for six (6) classes of track. As stated in 49 CFR 213.51:

> "This subpart prescribes requirements for the gage, alinment, and surface of track, and the elevation of outer rails and speed limitations for curved track." The words, "speed

limitations for curved track" sound like words that look to prevent derailments.

The point is that there is no rule, regulation, standard or order adopted by the Secretary of Transportation covering the subject matter of the safe speed of freight trains in a congested area. With a blink of the eye, Grand Trunk Western Railroad will ignore this salient fact and press on with the rest of its argument hoping that the Court will ignore the fact that the Secretary of Transportation has not yet adopted a rule, regulation, standard or order covering the subject matter of safe train speeds in congested areas; although it has adopted a regulation for trains in isolation.

This important fact is recognized by the Michigan Department of Transportation. Please see Appendix page 118a an affidavit of the Special Assistant to the

Administrator, Railway Safety and Tariff Division, MDOT which provides in pertinent part:

> "That said rules, regulations, orders and standards promulgated by the Secretary of Transportation concerning the maximum allowable operating speeds of trains as to specific track conditions existing in isolation have nothing to do with the speed of trains with reference to an essentially local safety hazard and have only to do with the actual physical properties of a safe train track."

The U.S. Supreme Court in Erb v Morasch, recognized that trains traveling through different locations may be the subject of different municipal ordinances in saying:

> "...it is obvious in a moment's reflection that the tracks of different railroads may traverse

the city limits under circumstances so essentially different as to justify separate regulations. **One may pass through crowded parts by crossing or along streets constantly traveled by foot passengers and vehicles,** while others may pass through remote parts of the city where there is little travel and little danger to individuals or carriage...**Under those circumstances a difference in regulation as to the matter of speed would be perfectly legitimate** and it could not be held that the classification was arbitrary or without reasonable reference to the conditions of the several roads." Erb v Morasch, 177 US 584, p. 898

(Bold type by the writer.)

Further, the highest court in the United States said:

"With the presumption always in

> favor of the validity of legislation, state or municipal, if the ordinance stood by itself the courts would be compelled to presume that the different circumstances surrounding the tracks of the respective railroads were such as to justify a different rule in respect to the speed of their trains." Erb v Morasch, 177 US 584, p. 898 (1900).

Since 49 CFR 213.9 only regulates the speed of trains as to conditions in isolation as is mandated by 49 CFR 213.1 and not as to conditions of safe train speeds in congested areas, it follows that the State of Michigan has a right to continue to allow home rule cities to pass freight train speed ordinances designed to protect the motoring and walking public in congested areas.

Grand Trunk Western Railroad Company argues that because the statute uses the

words "A State", cities are preempted from adopting train speed ordinances to protect the walking and motoring public.

There can be no question, however, that the legislature of the State of Michigan has passed the Home Rule Cities Act, which provides:

> "Each city may in its charter provide:
>
> (3) **For the exercise of all municipal powers in the management and control of the municipal property and in the administration of the municipal government, whether such powers be expressly enumerated or not:** for any act to advance the interests of the city, the good government and prosperity of the municipality and its inhabitants and through its regularly constituted authority to pass all laws and ordinances subject to the constitution and

general laws of this state." Home Rule Cities Act, MCLA 117.4j; MSA 5.2021 4j (Bold type by the writer.)

"Each city may in its charter provide:

(1) Public ways. **For the** use, **regulation**, improvement **and control of the surface of its streets,** alleys, **and public ways, and of the space above and beneath then;** Home Rule Cities Act, MCLA 117.4h(1); MSA 5.2081 4h(1). (Bold type added by the writer.)

It follows that since the City of Fenton controls the street upon which Grand Trunk freight trains travel across, the City of Fenton Council may exercise control of that property, by express delegation of power found in MCLA 117.4 h(1); MSA 5.2081.

Since all Michigan home rule cities can provide for the regulation and control of their streets above and beneath them; they can control the speed of freight trains on tracks that are above or beneath the street if they come within the exception to preemption.

Further, by virtue of the Michigan Constitution, municipalities are given the authority to control the speed of trains traveling over their streets. The Michigan Constitution states:

> "...Except as otherwise provided in this Constitution the right of all cities...to the reasonable control of their...streets...is hereby reserved to such local units of government." Art 7, §29, Michigan Constitution.

In 1971, the Michigan Supreme Court made the following clear:

> "Michigan is a strong home-rule state. Our constitution recognizes

basic local authority. Const 1963, Art 7, §22. Legislation grants liberal powers. MCLA §117.4j (Stat Ann 1949 Rev §5.2083)..." Alco Universal v City of Flint, 386 Mich 359, p 363 (1971).

Grand Trunk would have the U.S. Supreme Court strike down this statutorally and constitutionally granted power to home rule cities and declare all the freight train speed ordinances enacted by cities from Marquette, Michigan to Detroit, Michigan unconstitutional. The effect of such a ruling would be to jeopardize the safety of persons who are presently protected by these train speed ordinances on a daily basis.

The State of Michigan has thus given home rule cities reasonable control of their streets and so it follows that when

Congress said that "...A State...may continue in force any law...relating to railroad safety...until such time as the Secretary has adopted a rule, regulation, order or standard covering the subject matter of such state requirement...", Congress intended that the State of Michigan should continue to allow cities to control their streets.

If the Appellant would have this Court ignore Article 7, §29 of the Constitution of the State of Michigan, it should be mindful that the Michigan Constitution admonishes:

> "The provisions of this constitution and law concerning counties, townships, cities and villages shall be liberally construed in their favor..." Const 1963, Art 7, §34.

Nowhere in the Federal Railway Safety Act is there any mention of a preemption

of states from delegating authority over city streets to cities.

Grand Trunk will argue that if home rule cities are allowed to retain their train speed ordinance, then there will be many different train speed requirements in our state. To that, Michigan cities may argue--there are already many different freight train speed limits in the State of Michigan based upon 49 CFR 213.9.

The Michigan Supreme Court addressed a similar problem in Huron Portland Cement Company v City of Detroit, and in compelling language said:

> "We concede that this subject (air pollution) is one that might well call for uniform legislation of Federal scope, but until that happens we are not persuaded that our citizens must patriotically gag, choke and grope with obedient resignation until that happy day arrives. Nor are we persuaded that

short of any such uniform legislation that local governments are in the meantime powerless to make a proper exercise of their police power." Huron Portland Cement Company v City of Detroit, 355 Mich 237, (1959). (Bracketed words by the Petitioner.)

If the United States Congress wanted to enact legislation concerning the subject matter of safe freight trainspeeds in congested areas, it certainly could do this; but until that day arrives, cities must fill in the gaps of the Federal Railway Safety Act and continue in effect train speeds in congested areas where essentially local safety hazards exist.

It follows that a city may adopt a freight train speed law that is slower than a federally set speed limit, when the city council has determined that the slower speed limit is safer and the

federal rule is only an initial minimum safety requirement.

ISSUE 2. MAY A CITY ADOPT A FREIGHT TRAIN SPEED LAW FOR AN INTERSECTION WHERE TWELVE PERSONS HAVE DIED, WHEN THE CITY COUNCIL HAS DETERMINED THAT A SLOWER SPEED LIMIT IS NECESSARY TO ELIMINATE OR REDUCE AN ESSENTIALLY LOCAL SAFETY HAZARD?

Although there is no United States Court of Appeals decision on this issue, and the Michigan Supreme Court is the only state Supreme Court to decide this issue, the few Federal District Court decisions on local freight train speed ordinances all recognize that the following is an exception t preemption:

> "**A state may adopt or continue in force** an additional or **more stringent law, rule, regulation,** order or standard **relating to railroad safety** when necessary to

> **eliminate or reduce an essentially local safety hazard,** and when not incompatible with any Federal law, rule, regulation, order or standard and when not creating an undue burden on interstate commerce." 45 USC 434. (Bold type by the Petitioner)

There can be no question that the City of Fenton's freight train speed of 25 miles per hour is more stringent than the Secretary of Transportation's freight train speed limit of 50 miles per hour. The first condition of the exception to preemption is, thus, made out.

Next, it must be determined if an essentially local safety hazard exists. Petitioner's statement of facts demonstrates that there is indeed an essentially local safety hazard in the City of Fenton.

The Fenton Train Speed Ordinance is not incompatible with the Code of Federal Regulations. In a safety hazard area such as the North Leroy Street crossing in the City of Fenton, the slower train speed limit would be required to be met. The Michigan Supreme Court found that, "...it is possible for trains to obey both the federal and local limit..." Opinion of the Michigan Supreme Court. (Appendix page 1a)

As to the "not creating of an undue burden on interstate commerce requirement," a city imposed 6 mile per hour train speed limit was upheld in Erb v Morasch, supra. The United States Supreme Court ruled that:

> "...city when authorized by the legislature, may regulate the speed of railroad trains within the city limits... Such act is, even as to interstate trains, one only indirectly affecting interstate

commerce, and is within the power of the state until at least Congress can take action in this matter." Erb v Morasch, supra.

It should be noted that Erb v Morasch, supra, is a landmark case that has never been reversed by the United States Supreme Court.

In order to prevail, Grand Trunk must resolve this quandary: Article 4, Section 29 of the Constitution of 1963 for our State provides: "The legislature shall pass no local or special act in any case where a general act can be made applicable, and whether a general act can be made applicable shall be a judicial question." If the legislature cannot pass a local act, how may it address an "essentially local safety hazard" within the meaning of 45 USC 434?

When looking at the issue of whether or not the State of Michigan intended a

delegation of power to home rule cities to control their streets and trains that pass over them it is important to note that the voters of Michigan enacted a constitutional provision that stated: "...the right of...cities...to the reasonable control of their...streets...is reserved to such local units of government." Const 1963, Art 7, §29. This grant of power to cities must be literally construed in their favor since Article 7, §34 of the Michigan Constitutionstates:

> "The provisions of this Constitution and law concerning counties, townships, cities and villages shall be liberally construed in their favor. Powers granted to counties and townships by this constitution and by law shall include those fairly implied and not prohibited by this Constitution." Const 1963, Art 7, §34.

It is also important to note that the Convention Comment on Article 7, §34 was as follows:

> "This is a new section intended to direct the courts to give a liberal or broad construction to statutes and constitutional provisions concerning all local governments. Home rule cities and villages already enjoy a broad construction of their powers and it is the intention here to extend to counties and townships within the powers in the interpretation of the constitution and statutes."
>
> (Citation found following Art 7, §34 in MCLA p 307 and following Art 7, §34 in MSA p 23.)

Absent any manifestation of the intent of the United States Congress to preempt Const 1963, Art 7, §34, Const 1963, Art 7, §29, Article 4j of the Home Rule Cities

Act, Article 4h of the Home Rule Cities Act or to overturn the ruling of the United States Supreme Court in Erb v Morasch, 177 US 584, the delegation of control over streets given to the City of Fenton by the State Legislature and the people of the State of Michigan must prevail. Nowhere within 45 USC Sec 434 will this Court find a manifestation of an intent of the United States Congress to preempt the State of Michigan or similar states from delegating to cities such as the City of Fenton the right to continue to force more stringent train speed laws when necessary to reduce an essentially local safety hazard such as the one that has existed and continues to exist in the City of Fenton.

Robert Holmes Bell, U.S. District Court Judge, reviewed the so-called second exceptio to preemption for 45 USC 434. The Court said:

"...here's the important question: ...'when necessary to eliminate or reduce an essentially local safety hazard, and when not incompatible with any Federal law.

This Court's interpretation of that paragraph, then, means that in these various localities -- and this court has had a couple of lawsuits in the last several years involving speed limits of trains within towns and cities. This Court would interpret those speed limits within the towns and cities to fall directly within the essential local safety hazard and consequently you find Fowlerville and St. Johns and a few of these cities with speed limits for trains at 30 miles per hour. Well, that's clearly permitted here." CSXT, Inc. a Virginia

Corporation v Department of Transportation of the State of Michigan, excerpt of hearing page 7, line 20, February 4, 1988. (It should be noted that this case concerned another safety issue.)

The Michigan Constitution allows cities the reasonable control of their streets, Const 1963, Art 7, §29. The Michigan State Legislature allows home rule cities such as the City of Fenton to control the surface of streets above and beneath them. (MCLA 117.4h(1); MSA 5.2081 4h(1)) Appendix page 210a).

Congress has done nothing to change the rights of cities to such control over their streets in enacting 45 USC 434 so long as an essentially local safety hazard exists and the other requirements to the exception to preemption exist.

A State Legislature may continue in force a freight train speed ordinance when

the ordinance is more stringent than a regulation passed by the Secretary of Transportation in order to eliminate or reduce an essentially local safety hazard.

The Home Rule Cities Act has long been recognized as an act that grants to cities the power to control its streets above and beneath the surface. If this important police power is to be taken from home rule cities, the Congress of the United States must so indicate. Congress has not removed the power of home rule cities to control traffic over the surface of its streets in enacting the Federal Railway Safety Act and this Court may greatly enhance public safety by upholding the validity of the Home Rule Cities Act.

It follows that a city may adopt a freight train speed law for an intersection where twelve persons have died, when the city council has determined that a slower speed limit than the

federally set limit is necessary to eliminate or reduce an essentially local safety hazard.

ISSUE 3. DO THE PRINCIPLES OF LAW AS SET OUT BY THE U.S. SUPREME COURT IN WISCONSIN PUBLIC INTERVENOR V MORTIER, 111 SUP. CT. 2476 (1991) SO CONFLICT WITH THE MICHIGAN SUPREME COURT'S OPINION IN GRAND TRUNK WESTERN RAILROAD V CITY OF FENTON, 439 MICH 240 (1992) AS TO REQUIRE A REVERSAL OF THE MICHIGAN SUPREME COURT?

In Wisconsin Public Intervenor v Mortier, the United States Supreme Court held "FIFRA does not preempt local governmental regulation of pesticide use". Wisconsin Public Intervenor, 111 S. Ct 2476, No. 89-1095, p 2478, decided June 21, 1991. This is significant to the determination as to whether 45 USC 434 preempts local regulation of train speeds because in Wisconsin Public Intervenor, the highest court in the U.S. was called upon

to determine whether the use of the word "state" in the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), preempted local regulation.

In Grand Trunk Western Railroad v City of Fenton, Michigan Court of Appeals Opinion No. 116341, published at 164 Mich App 166 (June, 1990) at page 169, line 13, the Michigan Court of Appeals ruled: "Section 434 of FRSA specifically states that all rules relating to railroad safety shall be nationally uniform, with only two exceptions allowed for state action."

It follows that the Michigan Court of Appeals followed the reasoning of a handful of Federal District Court Judges who had ruled prior to Wisconsin Public Intervenor v Mortier that cities could not enact train speed laws because they were preempted by 45 USC 434 and did not fall into one of the two exemptions to preemption as found in 45 USC 434. It

should be clearly noted that when the Court of Appeals ruled against the City of Fenton on June 5, 1990, Wisconsin Public Intervenor v Mortier had not yet been decided by the U.S. Supreme Court.

The facts of Wisconsin Public Intervenor v Mortier may be succinctly summarized as follows. In 1972, FIFRA was amended specifying that "a State" may regulate the sale or use of pesticides. Pursuant to its police power, a town in the State of Wisconsin adopted an ordinance that required a permit for certain applications of pesticides to private lands. Respondent Mortier was denied a permit and he brought a declaratory judgment action in County Court claiming that the town ordinance was preempted by FIFRA. The lower court granted summary judgment for Mortier and the Wisconsin State Supreme Court affirmed and found preemption on the ground that

FIFRA's text and legislative history, "...demonstrate a clearly manifest Congressional intent to prohibit any regulation of pesticides by local governmental units." Wisconsin Public Intervenor v Mortier, page 2478. In reviewing the error of the Wisconsin State Supreme Court, the United States Supreme Court admonished:

> "When considering preemption, we start with the assumption that the historic powers of the States are not to be superseded by Federal Act unless that was the clear and manifest purpose of Congress." Wisconsin Public Intervenor v Mortier, p 2482, line 13.

The logic of the U.S. Supreme Court unveiled as follows:

> "FIFRA nowhere expressly supersedes local regulation. Neither the Act's language nor the legislative

history relied on by the Court below, whether read together or separately, suffices to establish preemption. The fact that §136v (a) expressly refers only to "[a]State" as having the authority to regulate pesticide use, and the Act's failure to include political subdivisions in its § 136 (aa) definition of "State", are wholly inadequate to demonstrate the requisite clear and manifest congressional intent. Mere silence is insufficient in this context."

The fact that the first exception to preemption in 45 USC 434 expressly refers only to "A State may adopt or continue in force any

law...", and 45 USC 434's failure to include political subdivisions in its first exception to preemption renders 45 USC 434 wholly inadequate to demonstrate the requisite clear and manifest congressional intent. 45 USC 434's affair with silence is insufficient in this context. There simply is no express superseding of local governmental authority to be found in the entire Federal Railway Safety Act. But the United States Supreme Court goes much farther in elucidating its principle that the fact that Congress chooses the words "A State" in a federal law does not serve to preempt local government in saying:

> "And the exclusion of local governments cannot be inferred from the express authorization to "State[s]" because the term is not self-limiting; political subdivisions are merely subordinate

components of the very entity the statute empowers...Indeed, the more plausible reading of the express authorization leaves the allocation of regulatory authority to the absolute discretion of the States themselves, including the options of specific redelegation or leaving local regulation of pesticides in the hands of local authorities under existing state laws." Wisconsin Public Intervenor v Mortier, 111 S Ct 2476 (1991) page 2478, line 4, second column of Syllabus.

The exclusion of the City of Fenton from enacting a freight train speed limit cannot inferred from the express authorization to "a State" because the term is not self-limiting; such political subdivisions are merely subordinate components of the very entity the statute empowers. The

more plausible reading of the express authorization of 45 USC 434 leaves the allocation of regulatory authority to the absolute discretion of the states themselves, including the option of delegation of specific control of the surface of streets and public ways and of the space above and beneath them to cities as is required by the Home Rule Cities Act (MCLA 117.4h(1); MSA 5.2081 4h(1)), an existing state law.

The minimum safety requirement for freight train speeds established by the Secretary of Transportation only address themselves to freight train tracks in isolation. The safety subject matter for the City of Fenton is, thus, different than that addressed by the Secretary of Transportation.

As to the "not creating of an undue burden on interstate commerce" requirement, "a city imposed 6 mile per hour train speed limit was upheld in Erb v Morasch, supra. The United States Supreme Court ruled that:

> "...a city when authorized by the legislature may regulate the speed or railroad trains within the city limits...Such act is, even as to interstate trains, one only indirectly affecting interstate commerce, and is within the power of the state until at least Congress can take action in this matter." Erb v Morasch, supra.

It should be noted that Erb v Morasch, supra, is a landmark case that has never been reversed by the United States Supreme Court.

As the United States Supreme Court points out "...the exclusion of local governments

cannot be inferred from the express authorization to "State[s]" because that term is not self-limiting..." Wisconsin Public Intervenor, page 2478, line 4, second column of Syllabus. It follows that when the Michigan Supreme Court interpreted the word "State" in a self-limiting manner, it was plainly in error. The Michigan Supreme Court apparently thought that because the Federal Railway Safety Act in 45 USC 434 used the word "State" in the second exception to preemption, it meant only the State of Michigan and not cities. The U.S. Supreme Court tells us that "...political subdivisions are merely subordinate components of the very entity the statute empowers." Wisconsin Public Intervenor v Mortier, 111 S Ct 2476 (1991) at page 2478, line 7, second column.

The U.S. Supreme Court poignantly underscroes this principle of law in its opinion:

"As an initial matter, it would

still have to be shown under ordinary cannons of construction that FIFRA's delegation of authority to "State[s]" would therefore allow the States in turn to redelegate some of this authority to their political subdivisions either specifically or by leaving undisturbed their existing statutes that would otherwise provide local government with ample authority to regulate." Wisconsin Public Intervenor v Mortier, 111 S Ct 2476 (1991), page 2485, line 3, second column.

Justice Scalia also makes an important point about committee reports as a tool for determining congressional intent:

"Their .[Wisconsin Supreme Court Justices'] only mistake was failing to recognize how unreliable Committee Reports are--not only as a genuine indicator of

congressional intent but also as a safe predictor of judicial construction." Wisconsin Public Intervenor, supra, page 2488, line 17.

and

"On the important question before us today, whether that law denies local communities throughout the Nation significant powers to self-protection, we should try to give the test its fair meaning, whatever various committees might have had to say--thereby affirming the proposition that we are a Government of laws not of Committee Reports." Ibid, pagd 2490, line 26.

Besides a few Federal District Court opinions (that unanimously recognize that there are two exceptions to preemption in 45 USC 434), the Respondent relies upon

Committee Reports that are, at best, ambiguous.

A state may continue in force a freight train speed ordinance when the ordinance is more stringent than a regulation passed by the Secretary of Transportation in order to eliminate or reduce an essentially local safety hazard.

The City of Fenton receives the authority of the State of Michigan because as the United States Supreme Court set out in the test of Wisconsin Public Intervenor, at page 2483, line 7, second column:

> "...political subdivisions are components of the very entity the statute empowers."

The City of Fenton also received the authority of the State of Michigan to regulate all aspects of its streets above and below the surface from the Home Rule Cities Act, MCLA 117.4h(1); MSA 5.2081 4h(1) and through Article 7, §29 of the

Michigan Constitution. This redelegation of authority is expressly recognized by the United States Supreme Court in Wisconsin Public Intervenor, supra, page 2483, line 9, second column:

> "Indeed, the more plausible reading of FIFRA's authorization of the States leaves the regulatory authority to the 'absolute discretion' of the States themselves, including the option of leaving local regulation of pesticides in the hands of local authorities."

The US Supreme Court in Wisconsin Public Intervenor wisely stated an important point as to regulation of pesticides that applies equally to the regulation of freight train speeds where an essentially local safety hazard exists:

> "Many local governments now regulate pesticides to meet their own specific needs which they are

often better able to perceive than are State and Federal regulators." Wisconsin Public Intervenor v Mortier, 501 US ___; 111 S Ct 2476; 115 L Ed 2d 532 (1991) at page 2484.

The "essentially local safety hazard" exception to preemption was thus designed to allow municipalities to provide a more stringent law to protect the public.

CONCLUSION

Petitioner respectfully requests that this Honorable Court grant certiorari to review the Opinion of the Michigan Supreme Court entered March 27, 1992.

Respectfully submitted,

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MICHIGAN SUPREME COURT

GRAND TRUNK WESTERN RAILROAD COMPANY,

Plaintiff-Appellee,

v. No. 89354

CITY OF FENTON,

Defendant-Appellant.

OPINION

BEFORE THE ENTIRE BENCH

CAVANAUGH, C.J.

We address in this case the validity of a municipal speed-limit ordinance applied to freight trains operating within city limits. We find the ordinance preempted by federal law, and we therefore affirm the judgment of the Court of Appeals.

I. FACTS AND PROCEDURAL HISTORY

The relevant facts in this case are undisputed. The City of Fenton, a small community in Genesee County, is bisected by a major freight train line operated by the Grand Trunk Western Railroad Company. Approximately twenty-four trains pass

through Fenton on this track each day, operating at speeds up to fifty miles per hour. Several automobile crossings exist within Fenton city limits. The busiest of these, the North Leroy Street crossing, is heavily traversed and has been the scene of a number of fatal accidents over the years.

On October 13, 1986, in response to the safety problems posed by the crossings and the perceived failure of Grand Trunk to address those problems adequately, Fenton passed an ordinance that imposed a speed limit of twenty-five miles per hour on freight trains operating within city limits. The ordinance provides that any violation "shall be considered a misdemeanor punishable by up to 90 days in jail and/or a fine of not to exceed $500.00," and that "[t]he person in immediate charge and control of a train and/or any railroad company or corporation, owning or operating any

railroad in violation of the provisions of this ordinance may be charged with the violation of the provisions of this ordinance."

On February 26, 1987, Grand Trunk filed a complaint in the Genesee County Circuit Court, seeking an injunction against enforcement of Fenton's ordinance on the ground that the ordinance is void under the Supremacy Clause, US Const, art VI, cl 2, because it is preempted by the Federal Railroad Safety Act (FRSA), 45 USC 421 et seq., and regulations enacted pursuant to it by the Secretary of Transportation.[1] On March 13, 1989,

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[1] Grand Trunk also alleged that the ordinance imposed an undue burden on interstate commerce in violation of US Const, art I, §8, cl 3, but neither the circuit court nor the Court of Appeals addressed that issue, and we likewise find it unnecessary to do so.

following a number of procedural complications not relevant here, the circuit court granted summary disposition for Grand Trunk, and the requested injunction was issued on April 6, 1989. The Court of Appeals affirmed in an opinion per curiam, 184 Mich App 166; 457 NW2d 120 (1990), and this Court granted leave to appeal, 437 Mich 1035 (1991).

II. ANALYSIS

The general principles governing federal preemption are well established:

> "Our cases have established that state law is preempted under the Supremacy Clause, US Const, art VI, Cl 2, in three circumstances. First, Congress can define explicitly the extent to which its enactments preempt state law. Preemption fundamentally is a question of congressional intent,

and when Congress has made its intent known through explicit statutory language, the courts' task is an easy one."

"Second, in the absence of explicit statutory language, state law is preempted where it regulates conduct in a field that Congress intended the Federal Government to occupy exclusively. Such an intent may be inferred from a 'scheme of federal regulation...so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it'..."

"Finally, state law is preempted to the extent that it actually conflicts with federal law." English v General Electric Co., 496 US 72, ___; 110 S Ct 2270; 110 L Ed 2d 65, 74 (1990) (Citations omitted).

In this case, the Federal Railroad Safety Act provides a clear basis for applying the first form of preemption noted above:

> "The Congress declares that laws, rules, regulations, orders, and standards relating to railroad safety shall be nationally uniform to the extent practicable. A State may adopt or continue in force any law, rule, regulation, order, or standard relating to railroad safety until such as the Secretary [of Transportation] has adopted a rule, regulations, order, or standard covering the subject matter of such State requirement. A State may adopt or continue in force an additional or more stringent law, rule, regulation, order, or standard relating to railroad safety when necessary to

eliminate or reduce an essentially local safety hazard, and when not incompatible with any Federal law, rule, regulation, order, or standard, and when not creating an undue burden on interstate commerce." 45 USC 434."

It is clear under this provision that Congress generally intended to preempt any and all state or local regulation of railroad safety, except for regulations authorized under either of the two exceptions set forth in the statute. See, e.g., Donelon v New Orleans Terminal Co, 474 F2d 1108, 1112 (CA 5, 1973). Fenton argues that both exceptions apply, and that either one is sufficient to validate its ordinance. Grand Trunk makes several arguments against the application of either exception. First, it contends that both exceptions apply only to regulations

adopted by a "State," and not regulations adopted by cities or other units of local government.[2] Furthermore, with regard to the first exception, Grand Trunk contends that the Secretary of Transportation has indeed "adopted a rule, regulation, order, or standard covering the subject matter" of Fenton's ordinance, namely the federal train-speed regulations embodied in 49 CFR 213. With regard to the second exception, Grand Trunk contends that the ordinance, even if directed toward an "essentially

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[2] In the alternative, Grand Trunk argues that cities like Fenton do not possess any delegated authority under Michigan law to regulate freight train speeds. The Court of Appeals did not reach this issue, however, and we likewise find it unnecessary to do so.

local safety hazard,"[3] is incompatible with the federal regulations and imposes an "undue burden on interstate commerce."[4]

---

[3] It is unclear whether Grand Trunk concedes that the safety problems affecting Fenton's crossings constitute an "essentially local safety hazard" under § 434. As explained below, we are able to resolve this case in Grand Trunk's favor under the assumption that they do.

[4] As noted above, see N 1, we do not reach Grand Trunk's "undue burden" argument.

We agree with Grand Trunk that the first exception cannot save Fenton's ordinance, in light of 49 CFR 213. This regulation sets forth a detailed and comprehensive framework of speed limits for freight and passenger trains. See, e.g., 49 CFR 213.9(a), and part 213, appendix A. Fenton contends, however, that these provisions only regulate speed in relation to track and roadbed conditions, with the primary goal of preventing derailments without regard to the issue of crossing safety in congested urban areas, the primary concern of Fenton's ordinance.

This issue was recently addressed by the United States Court of Appeals for the Eleventh Circuit in Easterwood v CSX Transportation, Inc, 933 F2d 1548 (CA 11, 1991). Presented by the appellant in that case with essentially the same argument presented here by Fenton, the court in Easterwood stated:

"[As] the Supreme Court held in Florida Lime & Avocado Growers, Inc v Paul, 373 US 132, 142; 83 S Ct 1210; 10 L Ed 2d 248 (1963),...it is irrelevant to preemption analysis whether the state law's objectives are similar to or different from the federal law's objectives. Preemption analysis turns on Congress' intent to preempt state law and on the nature of the federal regulations. The Florida Line Avocado Growers Court noted that a comparison of the similarities and divergences in the objectives of the federal and state regulations will preempt state law. Id. Moreover, [the appellant] does not point to any legislative history for the speed limits and therefore she asks us to guess at the motives behind the Secretary of [Transportation's actions]. Such

guessing is inherently suspect. While [the appellant] assumes that the speed limits are designed to prevent derailments, it is equally valid to assume that the speed limits were set low enough that, in conunction with adequate grade crossing signals and gates, the speed limits were intended to lessen the number of grade crossing accidents as well as lessen the chances of derailments." 933 F2d 1554.

We find Judge Johnson's opinion in Easterwood to be soundly reasoned and persuasive, and we therefore conclude that the Secretary of Transportation has covered the subject matter sought to be addressed by Fenton's ordinance.

With regard to the "local safety hazard" exception of § 434, we conclude that, even assuming all other conditions were met, Fenton's ordinance is

necessarily "incompatible with" the regulatory framework of 49 CFR 213. The parties agree that the current speed limit under the federal regulations for freight trains passing through Fenton is fifty miles per hour, in contrast with the twenty-five-mile-per-hour limit imposed by the ordinance. While it is possible for trains to obey both the federal and local limits, it is clear that enforcement of the much lower local limit would substantially interfere with the carefully wrought federal scheme. It is undisputed that trains take many miles and a substantial amount of time to shift between substantially different speeds. Authorizing local speed limits like Fenton's would raise the spectre of a patchwork of conflicting local rules interfering with the uniformity and smooth operation of the federal regulatory framework. As one federal district court stated:

"Congress was concerned that the existence of fifty separate [railroad] regulatory systems in the fifty states would undermine safety. If so, separate regulation by every city, village, township, or hamlet along the mainline would undermine safety infinitely more. Separate municipal regulation of speed is so greatly at odds with the Congressional purpose of uniformity as to need no further argument." Consolidated Rail Corp v Smith, 664 F Supp 1228, 1238 (ND Ind, 1987), accord City of Covington v Chesapeake & O R Co, 708 F Supp 806, 808-809 (ED Ky, 1989).

Furthermore, we agree with Grand Trunk's argument that the §434 exceptions apply, in any event, only to the States and not to local governments. This conclusion is consistent with the plain

language of §434 and its legislative history,[5] and is supported by a

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[5] See House Report No. 91-1194, 91st Cong, 2d Sess, 1970 US Cond Cong & Admin News 4104, 4116-4117. This Committee Report refers consistently to a "State's" authority to regulate railroad safety under the exceptions to preemption of § 434, and makes no mention of excepting local or municipal regulatory authority from the broad federal preemption expressed by § 434. With regard to the second exception, the report states that "[s]ince these local hazards would not be Statewide in character, there is no intent to permit a State to establish Statewide standards superimposed on national standards covering the same subject matter." Id. at 4117. Because only a state, obviously, would have the power to contemplate "statewide standards" in the

Footnote [5] continued.

first place, this sentence offers further suggestive evidence that only states, not municipalities or other local governments, were envisioned by Congress as exercising the regulatory powers permitted under the § 434 exceptions.

unanimous line of precedent in the lower federal courts. See Donelon, supra, 474 F2d 1112-1113; CSX Transporation, Inc v City of Thornsby, 741 F Supp 889, 891-892 (MD Ala, 1990); Grand Trunk W R Co v Town of Merrillville, 738 F Supp 1205, 1207 (ND Ind, 1989); City of Covington v Chesapeake & O R Co, supra, 708 F Supp 385, 387-388 (ED Tenn, 1988); Southern Pacific Transportatn Co v Town of Baldwin, 685 F Supp 601, 603-604 (WD La, 1987); Chesapeake & O R Co v City of Bridgman, 699 F Supp 823, 826 (WD Mich, 1987); Consolidated Rail Corp v Smith, supra, 664 F Supp 1237-1238; Johnson v Southern R Co, 654 F Supp 121, 124 (WD NC, 1987); Sisk v Nat'l Railroad Passenger Corp, 647 F Supp 861, 865 (D Kan, 1986).

The United States Supreme Court's recent decision in Wisconsin Public Intervenor v Mortier, 501 US ___; 111 S Ct 2476; 115 L Ed 2d 532 (1991), does not compel a contrary conclusion. Mortier

involved an entirely separate federal statutory scheme, the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), 7 USC 136 et seq., replete with its own complexities and peculiarities. While the issue in Mortier bears a superficial similarity to that presented here, in that the petitioner in Mortier claimed that the FIFRA authorized local regulation of pesticides on the basis of statutory language expressly authorizing only a "State" to regulate pesticides under certain conditions, see 111 S Ct 2482, and 7 USC 136v, there is a crucial difference.

As the Court noted in Mortier, there was no claim that the FIFRA either expressly preempted local regulation of pesticide use or evinced a Congressional intent, apart from the statutory authorization to the states, to otherwise exclusively occupy that field. See 111 S Ct 2482-2483. Rather, the respondent's preemption argument with regard to the

statutory text[6] rested primarily on the express authorization of "State" regulatory authority, coupled with the statutory silence with regard to local regulatory "[m]ere silence...cannot suffice to establish a 'clear and manifest purpose' to preempt local authority." 111 S Ct 2483 (citations omitted).

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[6] Mortier also involved arguments for preemption on the basis of the legislative history of the FIFRA, see 111 S Ct 2484-2485; cf. 111 S Ct 2490 (Scalia, J. concurring in the judgment) (objecting that "we are a Government of laws not of committee reports"), but that is of no concern to us in this case because the FIFRA's legislative history obviously has no bearing on the FRSA. As we have already discussed, the FRSA's legislative history support our analysis here. See n 5.

In this case, by contrast, § 434 expressly indicates Congress's intent to occupy the entire field of railroad safety regulation, subject only to the two exceptions set forth in § 434. Thus, § 434's silence with regard to local regulatory authority is not itself the basis for concluding that local regulation is preempted; rather, that silence exists against the backdrop of statutory language otherwise generally preempting both state and local regulation. Because only "State" regulatory authority, under certain limited circumstances, is expressly exempted from the scope of § 434's preemption, it follows that local regulatory authority is not included in that exemption. Just as the statutory silence in Mortier was insufficient to establish preemption in the first place, so that statutory silence here is insufficient to overcome the preemption otherwise expressly mandated by the statute.

Furthermore, the Court in Mortier noted that other provisions of the FIFRA refer not only to the "States" but also to their "political subdivisions." See 111 S Ct 2483, and 7 USC 136f(b). As the Court stated, "[i]f the use of 'state' in FIFRA impliedly excludes subdivisions, it is unclear why the one provision would allow the designation of local officials for enforcement purposes while the other would prohibit local enforcement authority altogether." 111 S Ct 2483-2484. For these reasons, the Court's conclusion in Mortier that local governments remain free to regulate pesticides under the FIFRA does not conflict with our conclusion that local governments are barred from regulating railroad safety under § 434 of the FRSA.

For the foregoing reasons, and despite our sympathy for the genuine safety

concerns that motivated the adoption of Fenton's train-speed ordinance,[7] we are compelled to find that ordinance preempted and void under the Supremacy Clause, US Const, art VI, cl 2.

We affirm the judgment of the Court of Appeals.

Michael F. Cavanaugh
Charles L. Levin
James H. Brickley
Patricia J. Boyle
Dorothy C. Riley
Ropert P. Griffin
Conrad L. Mallett, Jr

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[7] We note that municipalities like Fenton are not without remedies for these concerns; rather, they must simply pursue remedies in cooperation with the state and such federal Departments of Transportation and in accordance with state and federal statutes and regulations.

STATE OF MICHIGAN

COURT OF APPEALS

GRAND TRUNK WESTERN RAILROAD COMPANY,

Plaintiff-Apellee,

v. June 5, 1990

CITY OF FENTON, FOR PUBLICATION

Defendant-Appellant. No. 116341

Before: Weaver, P.J., and Gillis and Cavanaugh, JJ.

PER CURIAM

This suit arises from an ordinance passed by Defendant, the City of Fenton, which set a maximum speed limit of twenty-five miles per hour for freight trains operating in the city. Plaintiff, Grand Trunk Western Railroad (Grand Trunk) brought this action for injunctive and declaratory relief on the grounds that the ordinance violates the Supremacy and Commerce Clauses of the United States Constitution. Plaintiff moved for summary disposition, which the circuit court

granted, finding that the ordinance violated the Supremacy Clause. Defendant appeals as of right, and we affirm.

The parties dispute no issue of fact relevant to the Constitutional issues; the matter presents a purely legal question properly addressed under MCR 2.116.

In 1900 the United States Supreme Court recognized the power of municipalities to regulate train speeds, stating:

> a city, when authorized by the legislature, may regulate the speed of railroad trains within the city limits...Such act is, even as to interstate trains, one only indirectly affecting interstate commerce, and is within the power of the state until at least Congress shall take action in the matter. Erb v Morasch, 177 US 584 (1900).

Since that time the United States Congress has passed the Federal Railway Safety Act, 45 USCS §421 et seq (FRSA). Thus the issue before us, one of first impression in our State Courts, is whether the FRSA preempts the power of Michigan cities to regulate the speed of railroads within their city limits.

I

Defendant first argues that the FRSA did not intend a total preemption of the power to regulate train speeds.

Congress may, within certain constitutional limits, preempt state and local governments, legislative authority in a given subject area. Wardair Canada v Florida Dept of Revenue, 477 US 1, 106 S Ct 2369, 91 L Ed 2d 1 (1986). Congressional intent determines whether federal law preempts a particular state or local law. When Congress enacts a statute which by its language expressly provides

that States cannot legislate in a given subject area, preemption is clear. Fidelity v Dela Cuesta, 458 US 141, 102 S Ct 3014, 73 L Ed 2d 664 (1982). When statutory language is less clear, state law will be adjudged preempted if federal law so pervades a given field as to evince a Congressional intent to exclusively occupy the field. Silkwood v Kerr-McGee Corp, 464 US 238, 104 S Ct 615, 78 L Ed 2d 443 (1984).

Despite Defendant's arguments to the contrary, it is clear that Congress has exhaustively regulated the area of railroad safety. §434 of the FRSA specifically states that all rules relating to railroad safety shall be nationally uniform, with only two exceptions allowed for State action.

We agree with the courts that have held that §431 and §434 of the FRSA can only be interpreted as a declaration of Congressional intent to preempt state law

in the entire area of railroad safety. See See Consolidated National Ass'n of Regulatory Utility Commissioners v Coleman, 542 F2d 11 (3d Cir 1976), Donelon v New Orleans Terminal Co, 474 F2d 1108 (5th Cir 1973), cert den 414 US 855, 94 S Ct 157, 38 L Ed 2d 105 (1973), Atchinson, Topeka and Santa Fe Railroad Co v Illinois Commerce Comm, 453 F Supp 920 (N.D.Ill 1977). Thus, a non-federal safety law will be preempted unless expressly authorized under the FRSA.

II

Defendant next argues that the city's ordinance falls within the exceptions established by §434. The exceptions provide that:

> 1) [A] State may adopt or continue in force any law, rule, regulation, order, or standard relating to railroad safety until such time as the Secretary has adopted a rule, regulation, order, standard covering

the subject matter of such State requirement.

2) [A] State may adopt or continue in force an additional or more stringent law, rule, regulation, order, or standard relating to railroad safety when necessary to eliminate or reduce an essentially local safety hazard, and when not incompatible with any Federal law, rule, regulation, order, or standard, and when not creating an undue burden on interstate commerce.

The Fenton ordinance finds no support under the first exception. The Secretary of Transportation has enacted regulations specifically designating permissible operating speeds for various classes of track. 49 CFR §213.9. Thus, Fenton's more stringent local ordinance cannot coexist with the federal regulations.

In asserting that its ordinance is permitted by the second exception, the City argues that the State has delegated

to the cities its power to control train speeds within city limits, citing Home Rule Cities Act, MCL 117.4h(1); MSA 5.2081(1) and Const 1963, art 7 §29.

We need not determine whether this authority has in fact been delegated, as the plain language of the exception indicates that only a state may adopt a more stringent railway safety law in response to a local safety hazard. Chesapeake Ohio Ry Co v City of Bridgman, 669 F Supp 823 (W.D. Mich 1987).

An amicus curiae brief was filed with this Court by the Michigan Municipal League, which represents 501 cities and villages in the State of Michigan. If we were to interpret §434 to mean that each of its clients alone could impose a speed limit on trains through its city borders, we would frustrate the stated purpose of the FRSA, to have a uniform, national system of railroad regulation.

Since municipalities are not included in this preemption exception, municipalities are preempted from passing more stringent train speed limits than those set out in 49 CFR §213. Chesapeake & Ohio Ry Co v City of Bridgman, supra.

We find the circuit court did not err in enjoining enforcement of the ordinance and declaring it unconstitutional. We affirm.

/s/Elizabeth A. Weaver

/s/John H. Gillis

/s/Mark J. Cavanaugh

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE

COUNTY OF GENESEE

GRAND TRUNK WESTERN RAILROAD COMPANY COMPANY, a Michigan Corporation,

Plaintiff, File No. 87-89704-CZ

v.

CITY OF FENTON, MICHIGAN,

Defendant.

Transcript of proceedings had in the above-entitled matter before the HONORABLE EARL E. BORRADAILE, Circuit Judge, on the 13th day of March, A.D., 1989, at Flint, Michigan.

APPEARANCES:

Gregory A. Roberts,
Attorney at Law
Appearing on behalf of
the Plaintiff

Douglas J. Callahan,
Attorney at Law
Appearing on behalf of
the Defendant.

I N D E X

(No Witnesses)

(No Exhibits)

THE COURT: Case No. 87-89704-CZ, Grand Trunk Western Railroad Company, a Michigan Corporation, plaintiff, versus City of Fenton, Michigan, defendant. Are both parties present?

MR. ROBERTS: Gregory Roberts on behalf of Grand Trunk Western Railroad, Judge.

MR. CALLAHAN: Your Honor --

THE COURT: All right, I have read all the voluminous material that both attorneys have submitted. I see no reason, since you had complete oral argument back last February or March, to give you anymore oral argument. There's nothing new to be added, is there?

MR. CALLAHAN: There is some case law and some other arguments --

THE COURT: Well, but --

MR. CALLAHAN: -- that you haven't had oral --

THE COURT: You submitted your briefs on this, and I gave you oral argument then. I don't see the need to give you more oral argument today.

MR. CALLAHAN: Whatever the Court feels is best. I do have some points to elucidate if you'll find it helpful.

THE COURT: I consider that you both briefed this very thoroughly and I've gone through the entire file, plus I've done my own research on it. I see no need to give you further oral argument, particularly when you had very complete oral argument and I read the transcript of that oral argument. In fact, I have the February 8 transcript as well as the April 22, '88 transcript that everything was presented.

MR CALLAHAN: I think what happened, as I recall, your Honor, midway through my presentation you stopped us and said had the plaintiff filed an actual written motion. So I didn't really get a chance to complete my argument.

THE COURT: I considered you had on April 22, you went at least six or seven pages. You had a lot of oral argument on April 22. And, then after Mr. Roberts raised

some questions about your -- some things you were arguing about, then you went on to argue further and quoted from a number of cases, at least for three to four more pages. So you've had your oral argument. The Court is going to make a ruling.

This matter is before the Court by adjournment. The file is now in order. I believe that the petition filed by the Grand Trunk now to tie in and also the counter-petition filed by the City to tie in says (7), (8) and (10), if I recall correctly, though there was no stipulated set of facts in the case. So (10) would not -- and I'm talking about 2.116(C). So it would be either (8), failure to state a cause of action; or (9), failure to state a defense.

The Court in part makes its findings as a matter of fact, which apparently is not disputed, though I'm not under (10) really. But I think questions of law are involved that may require the Court to make some findings.

The City of Fenton in its motion says that the Fenton City Council enacted a train speed ordinance on October 13, 1988. I think this must be October 18, 1987, because this matter started in the early part of 1988.

MR CALLAHAN: It was '86, your Honor.

THE COURT: '86? All right. The issue, of course, that is involved is a rather difficult question always on state rights as opposed to the Federal statute. And, in this case we're also involved with the constitutional provision of the U.S. Constitution. The primary argument seems to be as to 45 US Code 421, which was adopted as the Railroad Safety Act -- in fact, actually, in the legislature history that the Court got from the State Law Library it labels Public Law 91-458 as Federal Railroad Safety and Hazardous Material Transportation Control Act of 1970, to use the total entitlement. The

-- Excuse us a second. Off the record. (Whereupon a discussion was held off the record.)

THE COURT: Back on the record. The primary language that comes from 45 U.S. Code Section 434 is -- and I'll read from the motion of the defendant because he does not put it all in. It says:

> "A State may...continue in force an additional or more stringent law...relating to railroad safety when necessary to eliminate or reduce an essentially local safety hazard, and when not...creating an undue burden on interstate commerce."

And, that's adequate language to read relative to the issue in this case.

The question is one under the U.S. Constitution which gives the U.S. Congress control over the interstate commerce. And, then the Legislature -- legislative body, I should say, in following that

language, if it elects, can, as pointed out by a number of authors, allow some action by the various states or local bodies in terms of not preempting the entire field, though it has the right to preempt the entire field.

This Court's research indicates that under the title "Railroads" in 65 AmJur2nd there is a discussion relative to the various powers of the states and the Federal Government as it relates -- Section 25 talks about the power to regulate and says:

> "The power of governmental power to regulate railroads lies in the public interest pertaining to them, their character as common carriers, their role as public highways, their danger to life and property, the police power of the State, and in the case of Congress, its interstate commerce power."

At Section 28 the authors say:

> "No valid objection can be urged against delegation by the State to a municipality of power to regulate the manner of construction and operation of that part of a railroad within its limits, but a municipal ordinance relating to railroads cannot be sustained on the sole ground that it is within the general powers of the municipality. It has been decided that the question as to the reasonableness of such ordinance is one of law, and not of fact, although it frequently requires for its determination the establishment of facts."

Then into the area of control of speed, among other areas -- in fact, under Section 8 of the discussions in 65

AmJur2nd, supra, relative to train operation and services, Section 366 talks about speed and says:

> "It is the duty of railroads in the operation of trains not to exceed a speed that is reasonable under the circumstances."

Then Section 367 says:

> "In the absence of congressional action, the State and municipalities may limit the speed of interstate trains or mail trains without violating the Commerce Clause of the Federal Constitution, providing the limitation as such as under the circumstances is reasonable."

And, both attorneys have cited Erb v Morasch, M-o-r-a-s-c-h, 177 US 584; 44 Law Ed. 897; 20 Supreme Court 819; the plaintiff criticizing Erb, claiming that the 1970 enactment by Congress of the

Railroad Safety Act in essence overrides the language of the Supreme Court in the Erb case.

The issue that the Court has to decide in this case is whether the law is clear, with the Court able, perhaps, to draw some conclusions as to facts as to whether either party has the right to prevail on the questions raised as a matter of law under either 116(C)(8) or 116(C)(9).

The first issue probably that the Court has to decide is whether in fact the City of Fenton can enact legislation relative to speed as a matter of authority from state laws.

The Michigan Constitution -- if I can find my notes that I made relative to that -- gives local bodies a great deal of authority. Article section -- Article VII, Section 22 relative to home rule cities, which it seems to be conceded by

both parties Fenton is, says, in addition to the language that was in the Constitution:

> "No enumeration of powers granted to cities and villages in this Constitution shall limit or restrict the general grant of authority conferred by this section."

The convention comment to Article VII, Section 22 -- and the Court considers it can look at that, though we generally in legislature enactments have very little authority from comments, but we do have, luckily, from the convention. The convention comment says:

> "The new language is a more positive statement of municipal powers, giving home rule cities and villages full power over their own property and government subject to this Constitution and law."

The Court might note that Judge Hood wrote an opinion, 131 Mich App 698, Butcher v Detroit, that deals with the police powers of the State and notes that the 1908 Constitution as to cities and villages was pretty well the same language followed in the 1963 Constitution, though the part that the Court read was an addition that Judge Hood did not deal with. And, Judge Hood quotes from MCL 117.3(j) and also from Dooley v Detroit, 370 Mich 194, a 1963 Supreme Court case, in saying:

> "Under the 1908 Constitution and our Home Rule Cities Act, cities may exercise substantially greater powers essential to local government than they previously were allowed to exercise."

The major issue this Court has to decide first is the issue as to whether the Home Rule City Act, the Michigan

Constitution and the enactments by the State of Michigan relative to the Department of Transportation and its absorption -- I'll use the term loosely -- absorption into it of all the powers of the previous commissions, whether that in fact allows for the City of Fenton to act as if it were acting as the State under the language of the U.S. Code provision.

Since the Constitution says that the cities and villages have the powers as granted by the Constitution and law, it would be this Court's opinion that Legislature has given the authority to limit within certain areas the authority of the local home rule city.

One recent enactment which is relied on by the defendant in this case, and the plaintiff explains it away, is Section 35 of Public Act 1984, No. 10, which was an amendment, in essence, to Public Act, 1909, No. 300; and it deals with the maximum speed limits for railroad

locomotives but only deals with passenger railroad trains. The Court has tried to make sense out of that, cannot make a great deal of sense out of that.

There is in the Fourth Class Cities Act a provision that's very similar to this. But as the Court reads, about the only interpretation the Court can find of the language of that relative to fourth-class cities, an Attorney General opinion found in Opinion No. 5721 of June 13, 1980 seems to say that fourth-class cities remained fourth-class cities until they became either home rule cities, fifth-class home rule cities and special charter cities. So the Court is satisfied that the language of the Fourth-Class City Act is not applicable to Fenton, and that the only language the Court can find as it relates to railroads is this section added by the 1984 Act.

Since that is a specific provision and since that language of Section 35 says:

"After determining the maximum speed limit, the Director of the State Transportation Department shall issue an order notifying each city, village and township of the effective date of the speed limit, which date shall not be less than thirty days following the date of the order. The speed limit shall take effect on the specified date unless an appeal by resolution of the local governing body or by the operating railroad is filed with the State Transportation Commission before the proposed effective date of the speed limit as is set forth in the order. In -- if a timely appeal is filed, the order shall not take effect within that city, village or township unless the order is approved or modified by resolution of the State Transportation Commission following

consideration of the appeal by the Commission. If the Commission approves or modified an order by resolution, the effective date of the speed limit shall be established in the resolution of the Commission and the Director shall issue a revised order with regard to that city, village or township."

I find nothing in revieving all of the material submitted by the attorneys as well as any of the other information in this that indicates that the City of Fenton ever followed through with seeking that approval of the State Transportation Department. It would appear to the Court from the briefs filed by the City as well as the arguments made by the City in the previous arguments that it's relying solely on the Home Rule Act and has not followed the language provided in Section 35.

Because of that, and because of that provision in 1984 -- actually, the Court should indicate that, as it has already, that it was a 1909 Act and them some amendments made effective February 16, 1984. That the City of Fenton in seeking to regulate speed must find its authority through the State Transportation Department. This language is quite specific. And, since the constitutional provision relative to home rule cities indicated that, as provided by law, this post-dates and of the other provisions made by the Legislature relative to the authority of the cities to act.

So the issue that this Court views is before it is the issue as to whether within the language of the U.S. Code provision of 1970, it anticipated that the State could have the authority but not a local agency. And, the Court believes in reading the history of the Act and the report of the hearings as well as the

committee's report as appointed, I believe, as the Court recalls in reading the legislative history or Public Law 9-458, that the Senate and the House had some disagreement and it went to conference committee. But both Senate and House, I believe, had appointed a committee to do a study of this whole issue.

The whole report, which can be found at United States Code Congressional and Administrative News, Ninety-First Congress, second session, 1970, starting at page 4104 of that report, would indicate that both the House and Senate held hearings on Senate Bill 1933, and the Subcommittee on Transportation and Aeronautics met in March of 1970. Part of the report found at page 4106 -- and the Court won't read the entire report into the record -- but part of the report of the committee says that:

"A vast number of derailments, explosions, grade crossings and other accidents could be set forth here. The printed hearings contained descriptions of particular accidents. See the testimony of the National Transportation Safety Board. Some of the Examples given by the National Transportation Safety Board appear below in this report. As indicated, the need for safety improvement and legislation to assure such improvement is well established and is unquestioned by all the parties interested, labor, management, state representatives for example."

Going down to the middle of the page it says:

"The bill which the committee has reported is the most comprehensive rail safety legislation ever

reported to the Congress. It is true that a variety of rail safety statutes have been in effect for many years, most since the early decades of the century, some since the 1890's. The first of the Safety Appliance Acts dates back to 1893; the Signal Inspection Act and the Accident Reports Act to 1910; the Hours of Service Act to 1907; and the Locomotive Inspection Act to 1911. These and other rail safety statute have been reasonably effective in their respective areas. They were enacted to protect employees against particular hazards and the enforcement of their provisions over the years has saved lives."

Then, at the next page, 4107, they set forth three serious accidents which had occurred in Indiana, Massachusetts and Mississippi relating to trains that had

poisonous or highly inflammable cargo and much property damage was caused.

At page 4108 the report says:

> "The task force made a unanimous report on June 30, 1969. For a complete text of that report see Appendix F of this report. The task force report concluded that causes of train accidents are almost evenly divided among defects in or failure of track and roadbed, defects in or failure of equipment and human error. It is -- it also concluded that existing Federal and State rail safety regulations do not in most instances provide standards for track, roadbed, equipment, employee training and qualifications, or rules governing safe railroad operation. In addition, it found that accident reporting and investigation practices are deficient, and that

available statistics are insufficient to determine the primary or contributing causes of accidents. The task force also found that rail safety research is inadequate, sporadic and uncoordinated."

And, then it goes on to say that the unanimous recommendation was that there needed to be broad Federal regulatory authority over all areas of railroad safety.

And, then the report goes on to trace some of the problems relative to railroad safety and the problems. And, the recommendation basically is that Congress needed to enact a broad act which would give authority to the Department of Transportation and the Secretary of the Department of Transportation to act relative to dealing with these issues which transcended local problems.

They do say, in a discussion of the sections of the bill, that Section 202(a) providing the Secretary of Transportation shall prescribe appropriate Federal regulations for all areas of railroad safety, at page 4114 of report says:

> "In addition the Secretary's jurisdiction would extend to rail operations in areas presently governed by compacts and by other municipal authorities such as the Metropolitan Transit Authority in New York."

So that, as a part of the history, would indicate that even in a major city such as New York, which has a metropolitan transit authority, would be regulated by the Secretary.

They talk at page 4116 about grade crossing and railroad rights of way study and say:

> "Section 204(a) provides for a study of the problems of

eliminating and protecting railroad grade crossings and of protecting pedestrians in densely populated areas along railroad rights of way. The Secretary has one year from the date of enactment of the Act to submit his report to the President for transmittal to the Congress. The report must include the Secretary's recommendations for appropriate action including, if relevant, a recommendation for equitable allocation of the economic costs of any program proposed as a result of the study."

And, then the next paragraph says:

"The Committee is aware that grade crossing accidents constitute one of the major causes of fatalities connected with rail operations. the need to do something about these terrible accidents which have one of the highest incidents

of death and serious injury per accident, necessitates an immediate attack on the grade crossing problem as soon as possible. For this reason Section 204(b) of the bill directs the Secretary, pursuant to his authority under this Act and pursuant to his authority over highway, traffic, and motor vehicle safety, and highway construction, to undertake a coordinated effort toward the objective of developing and implementing solutions to the grade crossing problem, as well as measures to protect pedestrians in densely populated areas along railroad rights of way."

Then they get into the discussion of State regulation; that's at the bottom of page 4116 of the congressional history or legislative history, as well as State

participation on the next page, 4117. And, they note as to State participation at Section 206 is one of the key sections of the bill and says:

> As originally considered by the committee, this section allowed certifying states to adopt all Federal standards, except for those involving rolling stock and employee qualifications, enforcing them at State level. Violations involving rolling stock and employee qualifications were reserved to the Secretary for enforcement at the Federal level. The Committee believes, however, that such a vital part of our interstate commerce as railroads should not be subject to this multiplicity of enforcement by various certifying states as well as the Federal government. See

discussion earlier in this report under 'The Role of the States in Rail Safety' and under 'Comparison of Rail and Gas Pipeline Safety for Purposes of State Participation.' At the same time, the valuable assistance of the states will be very much needed to carry out this Act. Accordingly, the committee has revised the section as follows:".

And then it goes through the parts of 206 and then also deals with Section 207.

The Court, in reviewing this total legislative history, and the letters from the Bureau of the Budget Secretary of Transportation and others to Congressman Staggers, who was the chairman of the Committee on Interstate and Foreign Commerce, as well as from the U.S. Atomic Commission, and then the reading of the total report of the task force on railroad

safety, is of the opinion that Congress intended to preempt the entire field except as it provides for cooperation with State agencies. And, the Court underlines the word "State". They say at page 4126 of the Committee's -- or, of the task force's report:

> "Grade crossing accidents rank as the major cause of fatalities in railroad operation. They account for sixty-five percent of the fatalities resulting from all types of railroad accidents and rank second only to the aviation mishaps in severity. Annually, about four thousand accidents produce approximately sixteen hundred deaths, which is also a matter of major public concern."

They say on down on the same page relative to existing law, they say:

> "However, Federal funds may not be used to reduce hazards at railroad

crossings of city streets and on many State supplementary highways and local roads, which are not on the Federal aid system and which represent the remaining eighty percent of the total. A certain number of safety improvements are being made currently by the carriers and State and local agencies on crossings not on the Federal aid system. There is an imperative need for an expanded public program to cover these crossings in order to reduce immediately this extremely high fatality rate."

They say at page 4127 under railroad safety regulations:

"Federal statutes do not cover the trucks, wheels and axles of railroad cars, nor their design, construction or maintenance. Bridges and tunnels are not subject

to Federal regulations and no Federal authority governs track and roadbeds. There is no general authority to promulgate standards for employee qualifications, physical requirements and training, nor to prescribe uniform railroad operating rules. Almost all states have entered the field of rail safety regulation. However, there is no uniform pattern of involvement. Some are quire active in general rail safety matters, but most consideration is on grade crossing safety regulation. Certain states feels they are adequately equipped by statute or existing regulations to deal with any rail safety problem that may arise."

Reviewing this total history, as the Court has, relative to the intent of

Congress and relative to what the Secretary of Department of Transportation has done relating to that, convinces the Court that -- though the defendant has argued all the way along in this case that the speed regulations and the CFR only dealt with the roadbed problem, the Court is satisfied that it goes beyond that. The Court is satisfied, much as the Court understands the frustrations of small cities like Fenton, where there have been a number of deaths within the city and sometimes a feeling, as the Court has seen it before, of an unwillingness by the bureaucracy -- and the Court's talking about the Grand Trunk Railroad when it talks about bureaucracy; I can't think of any bigger bureaucracy than Grand Trunk Railroad that I've seen around the area -- the unwillingness of the bureaucracy to act.

The Court is satisfied that Congress intended that this be taken out of the

hands of local authorities and that it must be the Secretary of the Department of Transportation in cooperation with agencies formed, consistent with a 1970 Act, by the states. And, the Court believes that the whole action of Michigan would indicate that the Michigan Department of Transportation is the agency that by legislative enactment intends to act in that area.

It's a novel argument to say the Home Rule Act would give the city authority when in our Federal system there are certain areas where the Founding Fathers believed that there must be Federal control, though, as the Court has noted there is a history of State and local action as show in 65 AmJur2nd, supra.

But the Court -- and it has read all of the cases submitted by both parties in this matter. It's read the most recent opinion submitted by the City of Fenton, which was decided, I believe in '71 or '72

-- no, '75 or '76 was the one out of the Michigan Supreme Court relative to the authority of local government. That is not on point when it comes to the issue in this particular case.

The City of Fenton has the option of going to the Department of Transportation to ask for assistance. It also has the option of going to congressmen and seeking to help it somewhat in the problem that it sees. But the Court believes that the Congress intended to preempt entirely except as to those areas where a State has adopted a law, rule or regulation. And, the State, the Court cannot find means a local unit of government under the language of the total history of this Act.

A number of Federal District Judges have decided on this. Some of them have some influence on this Court. Admittedly, one in the Western District of Michigan has no authority over this Court. And, there's been none on the Eastern District

of Michigan that the Court has found. And, the Court has read as many as it could find of the cases that have dealt with this issue. And, of course, circuits other than the Sixth Circuit are not binding on this area. There is a Third Circuit case that the railroad wishes to rely on. The decision by that Court may be consistent with what this Court is finding, but the Court does not consider that it is compelling. In fact, it was on another area of safety, as I recall, rather than on the particular question of speed.

The Court does grant the motion of the plaintiff for summary disposition, finding that as a matter of law the U.S. Congress has preempted the field. And, only as there have been regulations developed by the Secretary of the Department of Transportation and properly published, which allow for states to be involved through their agencies which have been

approved by the State, can there by any authority to limit speed. And, the Court finds that the City of Fenton is not within that area because of the legislation by the State of Michigan, which by law under the Michigan Constitution overrides any authority by a home rule city or any other city to have authority over interstate commerce to the extent that the City of Fenton wishes to exercise that authority.

So under 2.116(C)(9) the City of Fenton has failed to state a defense, and the Plaintiff railroad is entitled to a judgment as a matter of law. And, plaintiff's counsel may prepare the order consistent with the Court's findings.

MR. ROBERTS: Thank you, Judge. If I may one moment. It's obvious to this attorney, who's dealt with this issue for a period of years now, that the Court went to extensive independent investigation into both the cases, the issues and the

supporting arguments. I want to compliment the Court on what I consider to be --

THE COURT: I didn't like my conclusion.

MR ROBERTS: -- an excellent and scholarly decision.

THE COURT: I might indicate I didn't like the conclusion because, as I say, I think Grand Trunk sometimes is a bureaucracy that ignores local needs. But --

MR. ROBERTS: I --

THE COURT: -- as a matter of law I have to find in your favor.

MR. ROBERTS: Your Honor, I will also bring to the attention of the principals of the Grand Trunk that reexamination of certain aspects of this question may be necessary. And, your concerns over an overly bureaucratic response will be brought to the appropriate parties.

THE COURT: I appreciate that.

MR. ROBERTS: I'll prepare the order, Judge.

THE COURT: All right, Thank you.

-oOo-

FULL TEXT OF THE STATUTE OF THE STATE OF MICHIGAN RELIED UPON BY THE GENESEE COUNTY CIRCUIT COURT AT APPENDIX PAGE 47a MCLA 462.35; MSA 22.53 (1):

> "(1) The state transportation department shall promulgate rules establishing the standards by which the director of the department shall determine maximum speed limits for railroad locomotives when used in **passenger train operations** and for **passenger railroad trains.** The rules shall provide that the director base his or her determinations on engineering, traffic, and safety inspections; on federal railroad safety standards; and on state on-site inspection criteria provided for in the rules.

(2) The speed limits established by the director shall designate expressly those portions of the railroad routes in this state to which the speed limits shall apply for **passenger train operations.** The maximum speed limit for **passenger train operations** may vary on specified portions of a route on the basis of safety and other factors.

(3) Before making a determination establishing a maximum speed limit, the director of the state transportation department shall give consideration to local governmental comments. After determining the maximum speed limit, the director of the state transportation department shall issue an order notifying each city, village, and township of the

effective date of the speed limit, which date shall not be less than 30 days following the date of the order. The speed limit shall take effect on the specified date unless an appeal, by resolution of the local governing body or by the operating railroad, is filed with the state transportation commission before the proposed effective date of the speed limit as is set forth in the order. If a timely appeal is filed, the order shall not take effect within that city, village, or township unless the order is approved or modified by resolution of the state transportation commission following consideration of the appeal by the commission. If the commission approves or modifies an order by resolution, the effective date of the speed limit shall be established in the

resolution of the commission, and the director shall issue a revised order with regard to that city, village, or township."

Please note that the words **passenger train operations** are not in bold type in MCLA 462.35; MSA 22.53 (1); but are made bold by the writer to demonstrate that the statute relied upon by the Circuit Court pertained only to passenger trains and not to freight trains. Only freight trains pass through the City of Fenton.

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE

COUNTY OF GENESEE

GRAND TRUNK WESTERN RAILROAD COMPANY,
A Michigan Corporation,

Plaintiff, Case No.87-89704-CZ

v. JUDGE BORRADAILE

CITY OF FENTON, MICHIGAN,

Defendant.

ORDER FOR SUMMARY DISPOSITION AND PERMANENTLY ENJOINING DEFENDANT FROM ENFORCING ORDINANCE NO. 459

At a session of said Court held in the Circuit Court, City of Flint, State of Michigan, on the ___ day of March, 1989.

Present: _____

Hon. Earl E. Borradaile

This matter having come before the court by the parties cross motions for summary disposition, and the court having

previously heard the arguments of the parties having considered the briefs and being otherwise informed in the premises;

IT IS HEREBY ORDERED AND ADJUDGED that the City of Fenton is permanently enjoined from the enforcement in any manner of Ordinance No. 459 of the ordinances of the City of Fenton, regulating speeds at which trains may operate within city limits;

IT IS FURTHER ORDERED AND ADJUDGED that any and all tickets, civil infractions, criminal warrants or indictment issued under the authority of the people of the City of Fenton pursuant to the stricken ordinance, be dismissed;

IT IS FURTHER ORDERED AND ADJUDGED that said Ordinance No. 459 is void ab initio and of no force and effect insofar as said ordinance is violative of the Constitution and laws of the United States.

HON. EARL E. BORRADAILE

CIRCUIT COURT JUDGE

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE

COUNTY OF GENESEE

GRAND TRUNK WESTERN RAILROAD COMPANY,
a Michigan Corporation,

Plaintiff, Case No. 87-89704-CZ

v. JUDGE BORRADAILE

CITY OF FENTON, MICHIGAN

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COMPLAINT

NOW COMES Plaintiff, Grand Trunk Western Railroad Company (Grand Trunk), by and through Gregory A. Roberts and Robert P. Keil, and for its complaint states as follows:

PARTIES

1. Grand Trunk is a Michigan and Indiana corporation with its principal office and place of business in Detroit, Michigan, within the jurisdiction of this Court.

2. Grand Trunk is a "common carrier" and a "rail carrier" engaged in interstate commerce within the meaning of the Interstate Commerce Act, 49 USCA, Section 10101, et seq., and is a "railroad" within the meaning of the Federal Railroad Safety Act, 45 USCA, Section 421, et seq.

3. Grand Trunk is an integral link in the national railway system, serving numerous industries and communities located in four states and connecting interchanging traffic with other railroads and carriers for transport through the United States, Canada and other destinations.

4. Fenton, Michigan, is a home rule city within the meaning of MCLA 117.1, et seq.

COMMON ALLEGATIONS

5. On October 13, 1986, Fenton adopted Ordinance Number 459, effective October 28, 1986 ("the Fenton Ordinance"), purporting to regulate the speed of trains within the Fenton city limits. In pertinent part the Fenton Ordinance states:

> That the maximum speed limit of railroad trains operating in the City of Fenton is hereby limited to 25 miles per hour.

6. That both prior to and subsequent to the enactment of the Fenton Ordinance, Grand Trunk personnel communicated with both the city manager and the city attorney to discuss concerns about the operation of Grand Trunk trains and to secure repeal of the Fenton Ordinance, said efforts were not successful.

7. That Grand Trunk has been put on notice that efforts to enforce the ordinance have been actively pursued.

8. That Grand Trunk operates approximately 24 regular trains per day through Fenton's municipal limits.

9. That these trains may operate through Fenton at speeds of up to 50 miles per hour in order to meet specific schedules for interchange with motor, rail and marine carriers, and to provide delivery of goods throughout the United States and Canada.

10. That if defendant's continue to attempt to reduce operating train speeds to 25 miles per hour and below, the railroad's ability to provide services as a common carrier will be significantly impaired and plaintiff will be unable to timely transport goods and property of industry and government, causing disruption in intrastate and interstate commerce.

11. If these trains do not meet these schedules, most of the traffic carried by the Grand Trunk through Fenton, would be

subject to diversion to either motor carriers or other rail carriers since in today's highly competitive transportation environment motor and rail carriers are used as "pipelines" for inventory in order to reduce the inventory carrying costs of manufacturers.

12. That defendant imposed the unreasonable speed ordinance in reaction to grade crossing accidents within the city, which were completely unrelated to train speed and solely attributable to careless and negligent operation of the motor vehicles involved.

13. That defendant imposed the speed ordinance without any inquiry or informed advice as to the correlations between lower train speeds and the increased incidents of train/auto collisions.

14. That the defendant did not inquire into or consider alternative measures to reduce grade crossing risks, that would be less burdensome on

interstate commerce, inclusive of but not exclusive of increasing enforcement priorities of ordinances and statutes governing the operation of motor vehicles around and over railroad crossings at grade, and motor vehicle operation generally.

15. Grand Trunk has no adequate remedy at law. Unless the injunctive relief requested herein is granted, the Grand Trunk and the public will suffer injury, loss and damages. The monetary damages in controversy are in excess of $10,000.00.

FIRST CLAIM FOR RELIEF

16. Rules, regulations, orders and standards relating to all areas of railroad safety must be nationally uniform to the extent practical. 45 USCA Section 434.

17. Authority to prescribe rules, regulations, orders and standards for all areas of railroad safety is vested in the

Secretary of Transportation. 45 USCA, Section 431(a). The Secretary has delegated her authority to the Federal Railroad Administration.

18. Once a rule, regulation, order or standard covering any area of railroad safety has been adopted, a state may not adopt or continue a requirement covering the same subject matter. 45 USCA Section 434.

19. Further, a State may only adopt or continue a regulation relating to railroad safety when necessary to reduce or eliminate any local safety hazard, so long as the State's rule is not incompatible with any federal rule or regulation or standard, and does not create an undue burden on interstate commerce. 45 USCA Section 434.

20. Only states, not incorporated municipalities are authorized to adopt or continue more stringent rules or regulations once the Secretary of

Transportation or the Federal Railroad Administration adopts a rule, regulation, order or standard covering any area of railroad safety, and then only in limited circumstances.

21. The Federal Railroad Administration has adopted rules explicitly and pervasively regulating the speed of trains at 49 CFR Part 213 and 40 CFR Part 236. The maximum authorized timetable speed for freight and passenger trains on the Grand Trunk main track through Fenton is 50 miles per hour. This timetable has been filed with the Federal Railroad Administration as required in 49 CFR, Section 217.7.

22. The Fenton ordinance is in direct conflict with the regulations adopted by the Federal Railroad Administratino at 49 CFR,. Part 213 and 40 CFR Part 236. Accordingly, the ordinance is preempted by federal regulation and violates 45 USCA, Section 434.

SECOND CLAIM FOR RELIEF

23. For its Second Claim for Relief, Grand Trunk incorporates herein the averments contained in paragraphs 1 through 22 above as if fully rewritten.

24. The United States Constitution states: "(1) The Congress shall have the power to regulate commerce...among the several states." U.S, Constitution Article 1, Section P.

25. The effects of the Fenton ordinance on interstate commerce are significant and not merely incidental, and the burden imposed on interstate commerce by said ordinance is clearly excessive in comparison to the putative local benefits derived.

26. That the Fenton ordinance violated Article 1, Section 8 of the Constitution of the United States.

27. That alternatives to the Fenton train speed ordinance exist that can

reduce the risks associated with grade crossing accidents in Fenton without any burden on interstate commerce.

WHEREFORE, plaintiff prays that the court:

1. Issue an injunction, restraining and enjoining the City of Fenton and all others acting in concert or participation with the defendant within the jurisdiction of this court from enforcing Ordinance No. 459 of the Ordinances of the City of Fenton,

2. Enter a Judgment declaring said Ordinance to be violative of the Constitution and laws of the United States, null, void ab initio and of no force and effect, and

3. Award plaintiff its reasonable attorneys fees and court costs.

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Attorney for Plaintiff
Grand Trunk Western Railroad
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Attorney for Plaintiff
G-4413 Corunna Road
Flint, Michigan 48504

Dated: January 30, 1987

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE

COUNTY OF GENESEE

GRAND TRUNK WESTERN RAILROAD COMPANY,
a Michigan Corporation,

Plaintiff, Case No. 87-89704-CZ

v. JUDGE BORRADAILE

CITY OF FENTON, MICHIGAN

GREGORY A. ROBERTS (P33984)
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ANSWER TO COMPLAINT

NOW COMES Defendant, City of Fenton, by and through Douglas J. Callahan, Attorney at Law, and for its Answer to Complaint states to this Honorable Court the following:

PARTIES

1. That the allegations contained in paragraph 1 are admitted to be true, although the City of Fenton does not admit that this Court has jurisdiction.

2. That the allegations contained in paragraph 2 are denied for the reason that the City of Fenton lacks information from Grand Trunk Western Railroad Company sufficient to form a belief as to the truth of the allegations, to wit, the City of Fenton does not have Plaintiff's train schedules.

3. That the allegations contained in paragraph 3 are admitted to be true.

4. That the allegations contained in paragraph 4 are admitted to be true.

COMMON ALLEGATIONS

5. That the allegations contained in paragraph 5 that the City of Fenton's train speed ordinance is "purporting to regulate the speed of trains within the city limits" is denied for the reason that the ordinance is a law passed under the clear authority of the Home Rules Cities Act (MCLA 117.1 et. seq.) and is consistent with the plain language of section 434 of the Federal Railroad Safety Act and as such the ordinance does more than merely purport the regular freight train speeds in the City of Fenton, it does, in fact, regulate such trains speeds with the full force and effect of law.

That the remaining allegations contained in paragraph 5 are admitted to be true.

6. That the allegations contained in paragaph 6 are admitted to be true.

7. That the allegations contained in paragraph 7 are admitted to be true.

8. That the allegations contained in paragraph 8 are denied for the reason that the City of Fenton lacks information sufficient to form a belief as to the truth of the allegations.

9. That the allegations contained in paragraph 9 are denied for the reason that these trains may not operate through the City of Fenton at speeds up to 50 miles per hour for the reason that the Ordinance specifically prohibits these trains from traveling faster than twenty-five (25) miles per hour.

That the further allegations found in paragraph 9 that suggest that the City of Fenton is the only municipality regulating the speed of freight trains is denied for the reason that many other municipalities in the State of Michigan also regulate the speed of freight trains to a maximum speed of twenty-five (25) miles per hour.

10. That the allegations contained in paragraph 10 are denied for the reason

that the City of Fenton lacks information sufficient to form a belief as to the truth of the allegations and for the further reason that many municipalities in the State of Michigan and several states of the United States of America regulate train speeds to twenty-five (25) miles per hour.

11. That the allegations contained in Paragraph 11 are denied for the reason that the City of Fenton lacks information sufficient to form a belief as to the truth of the allegations and for the further reason that many municipalities in the State of Michigan and several states of the Unites States of America regulate train speeds to twenty-five (25) miles per hour.

12. That the allegations contained in paragraph 12 that the City of Fenton imposed the speed ordinance in reaction to grade crossing accidents within the city are admitted.

That by way of explanation the City of Fenton affirmatively asserts that nine (9) fatalities and three (3) serious personal injuries were sustained by residents of Genesee County from October 11, 1964 to December 28, 1985 at the Leroy Street crossing through train tragedies with the Grand Trunk Western Railroad Company. A chart listing the date, time, direction of train movement, direction of vehicle movement and the number of such deaths and serious personal injuries is attached hereto, marked as Defendant's Exhibit 1 and incorporated herein by reference.

That the Ordinance passed unanimously by the representative of the people of the City of Fenton to regulate trains to a safe speed is not unreasonable because it directly relates to the health, safety and welfare of the residents of the City of Fenton, County of Genesee and State of Michigan.

That the allegations that the deaths and serious personal injuries of persons crushed by these trains were "solely attributable to careless and negligent operation of the motor vehicles involed" is denied for the reason that said allegation is untrue.

13. That the allegations contained in paragraph 13 are denied for the reason that the several and various health officers of the City of Fenton made diligent inquiry into each and every death caused by a train operating in the City of Fenton and carefully compared and evaluated the great disparity between the speed of trains and motor vehicles traveling in the area of the railroad tracks in the City of Fenton.

14. That the allegations contained in paragraph 14 are denied not only for the reason that the City of Fenton did inquire into and consider alternative measures to reduce grade crossing risks that would be

less burdensome but also the City of Fenton sought to have the Plaintiff install gates at the Leroy Street Train crossing.

15. That the allegations that "Grand Trunk had no adequate remedy at law" is denied by way of explanation it is further argued that the Grand Trunk Western Railroad Company has no adequate remedy in equity either for the reason that its prayer of relief for an injunction restraining the City of Fenton from enforcing its laws is invalid, contrary to law and contrary to equity and good conscience.

That the allegations that "unless the injunctive relief requested herein is granted, the Grand Trunk and the public will suffer injury, loss and damages, "it denied for the reason that such an injunction would greatly enhance the probability of serious personal injury and

death of motorists struck by freight trains traveling at high rates of speed and with a lessened ability st stop.

That the allegation that the "monetary damages in controversy is in excess of $10,000.00" is denied.

FIRST CLAIM FOR RELIEF

16. That the allegation contained in paragraph 16 is denied for the reason that it misstates the law and by way of explanation the City of Fenton affirmatively asserts that the statute cited by the Plaintiff actually states:

> "The Congress declares that laws, rules, regulations, orders, and standards relating to railroad safety shall be nationally uniform to the extent practicable." 45 USCA Section 434 (Italics by the writer).

17. That the allegations contained in paragraph 17 are denied for the reason that no all areas of railroad safety are

vested in the Secretary of Transportation for the reason that in certain instances a State by delegation of authority and express statutory authority "may adopt or continue in force an additional or more stringent law, rule, regulation, order or standard relating to railroad safety..." 45 USCA Section 434(Italics by the writer).

That, in addition, Plaintiff's allegation is false for the reason that it is contrary to the landmark ruling of the Supreme Court of the United States, Erb v Morasch, 177 US 584, 44 L Ed 897, 20 S Ct 819 (1900) which provides in pertinent part:

> "Third, that a city, when authorized by the legislature, may regulate the speed of railroad trains within the city limits." Erb v Morasch, p. 586.

That in Erb v Morasch the highest court in the United States of America emphasized:

"Such act is, even as to interstate trains, one only indirectly affecting interstate commerce, and is within the power of the state untid at least Congress shall take action in the matter." Erb v Morasch, p 586.

That the remaining allegations contained in paragraph 17 are admitted to be true.

18. That the allegations contained in paragraph 18 are denied for the reason that they misstake the law and by way of explanation the City of Fenton affirmatively asserts that the statute cited by the Plaintiff's actually states:

"A State may adopt or continue in force any law, rule, regulatin, order, or standard relating to railroad safety until such time as the Secretary has adopted a rule, regulation, order or standard covering the subject matter of such

State requirement. A State may adopt or continue in force an additional or more stringent law, rule, regulation, order, or standard relating to railroad safety..." 45 USCA Section 434. (Underlining added by Petitioner.)

That the fact that the State of Michigan has delegated to its municipalities authority to regulate the use of the space occupied by train tracks in incontroverted by a plain reading of the Home Rule Cities Act which provides:

"Each city may in its charter provide...For the use, regulation, improvement and control of the surface of its streets, alleys, and public ways, and of the space above and beneath them." Home Rule Cities Act (MCLA 117.4h)

That Fenton City Charter was adopted by a vote of the people on March 2, 1964 and then provided as it does now the

desire of the voters of the City of Fenton to have the power by Ordinance to regulate:

> "The...use, regulation, improvement and control of the surface of such streets, alleys, public ways and other public places and of the space above and beneath them." Fenton City Charter Section 25.5

19. That the allegations contained in paragraph 19 are denied and answered in accordance with the law cited in paragraph 18 above.

20. That the allegations contained in paragraph 20 are denied and answered in accordance with the law cited in paragraph 18 above.

21. That the allegations contained in paragraph 21 are denied for the reason that the Federal Railroad Administration has not preempted the right of a Home Rule City in the State of Michigan to adopt more stringent laws governing freight trains.

(45 USCA Section 434 and see Erb v Morasch, 177 US 585, 44 L Ed 897, 20 S Ct 819 (1900) and a long line of cases upholding this case as set out in Shephard's Federal Citations.)

22. That the allegations contained in paragraph 22 are denied and answered in accordance with the law cited in paragraph 18 above.

SECOND CLAIM FOR RELIEF

23. That the allegations contained in paragraph 23 are answered by incorporating herein the answers contained in paragraphs 1 through 22 above.

24. That the allegations contained in paragraph 24 are admitted based upon the assumption that the words "Section P" are a typographical error for the words "Section 8".

25. That the allegations contained in paragraph 25 are denied for the reason that the Supreme Court of the United States has ruled that train speed

ordinances "only indirectly affect interstate commerce." (Erb v Morasch, p. 585). That burdens on interstate commerce by the Fenton Ordinance are not excessive when compared to the putative local benefits derived for the reason that said Ordinance preserves the protects the health, safety, and welfare of the residents of the City of Fenton and its environs.

26. That the allegations contained inparagraph 26 are denied for the reason that said allegations are untrue. By way of explanation the City of Fenton incorporates its answers to paragraph 18 and 21 herein.

27. That the allegations contained in paragraph 27 are denied for the reason that said allegations are untrue by virtue of case law cited in paragraph 18 herein and for the reason that the Constitution of 1963 of the State of Michigan provides in Art. 7 Sec. 29:

"Sec. 29...Except as otherwise provided in this constitution the right of all counties, townships, cities and villages to the reasonable control of their highways, streets, alleys, and public places is hereby reserved to such local units of government."

WHEREFORE your Defendant, The City of Fenton, prays that this Honorable Court dismiss Plaintiff's Complaint with Prejudice and award the City of Fenton reasonable attorney fees and costs to defend this action so wrongfully brought.

DOUGLAS J. CALLAHAN P25350
Attorney for Defendant
City of Fenton

Dated: March 12, 1987

FEDERAL RAILROAD ADMINISTRATION BULLETIN

INTRODUCTION

This eighth annual report, issued by the Federal Railroad Administration (FRA) Office of Safety, combines rail-highway crossing accident/incident statistics with the National Rail-Highway Crossing Inventory. Accident/Incident data comprising Accident/Incident reports filed by all railroads were gathered from the FRA's Railroad Accident/Incident Reporting System (RAIRS). The National Rail-Highway Crossing Inventory contains sight-survey date about all U.S. rail-highway crossings.

The Federal Railroad Safety Act of 1970 (P. L. 91-453) and the Accident Reports Act (45 USC 38-34) require railroads to file accident/incident reports with the FRA. The National Rail-Highway Crossing Inventory was developed in response to the Federal Railroad Safety Act of 1970 and the

Federal Highway Safety Acts of 1970 and 1973, requiring the Secretary of Transportation to work towards improving safety at rail-highway crossings.

Because of major revisions in reporting requirements, it is not possible to compare data collected after January 1, 1975, with information from prior years. These changes have resulted in an increase in the number of reported rail-highway accidents/incidents; casualty reports have also been increased but to a lesser extent. (Appendix A discusses current reporting requirements.)

* * * * *

Section 1 presents historical data of rail-highway crossing accidents/incidents for 1980 through 1985.

Section 2 contains 1985 accident/incident statistics obtained from the rail-highway crossing accident/incident file and the railroad casualty file.

Section 3 combines information from the rail-highway crossing accident/incident file with date in the National Rail-Highway Crossing Inventory and highlights relationships between certain grade crossing characteristics and accident frequencies.

Section 4 gives the physical and operational statistics for all public, at grade rail-highway crossings, described in the National Inventory, May 23, 1986.

The tables and figures in Sections 1,2,3,4 and Appendix C furnish data on public rail-highway crossings. Appendix D and tables 33 and 34 present date on private crossings. Tables 1,3,7a,9,13, D-3, and figures 1 and 3 pertain to crossing accident/incidents involving all types of highway accidents/incidents in which motor vehicles are involved. Table S, a summary of all accidents and incidents at every public and private crossing, follows.

1. RAIL-HIGHWAY CROSSING ACCIDENTS/INCIDENTS: HISTORICAL DATA, LAST SIX YEARS

TABLE 1. SUMMARY OF ACCIDENTS/INCIDENTS AND CASUALTIES AT RAIL-HIGHWAY CROSSINGS, LAST SIX YEARS

YEAR	NUMBER OF ACCIDENTS	TOTAL			CASUALTIES PER ACCIDENT
		KILLED	INJURED	CASUALTIES	
1980	9,763	783	3,662	4,450	0.46
1981	8,545	697	3,121	3,818	0.45
1982	7,158	590	2,508	3,098	0.43
1983	6,552	542	2,467	3,009	0.46
1984	6,633	610	2,723	3,333	0.50
1985	6,353	537	2,508	3,045	0.48

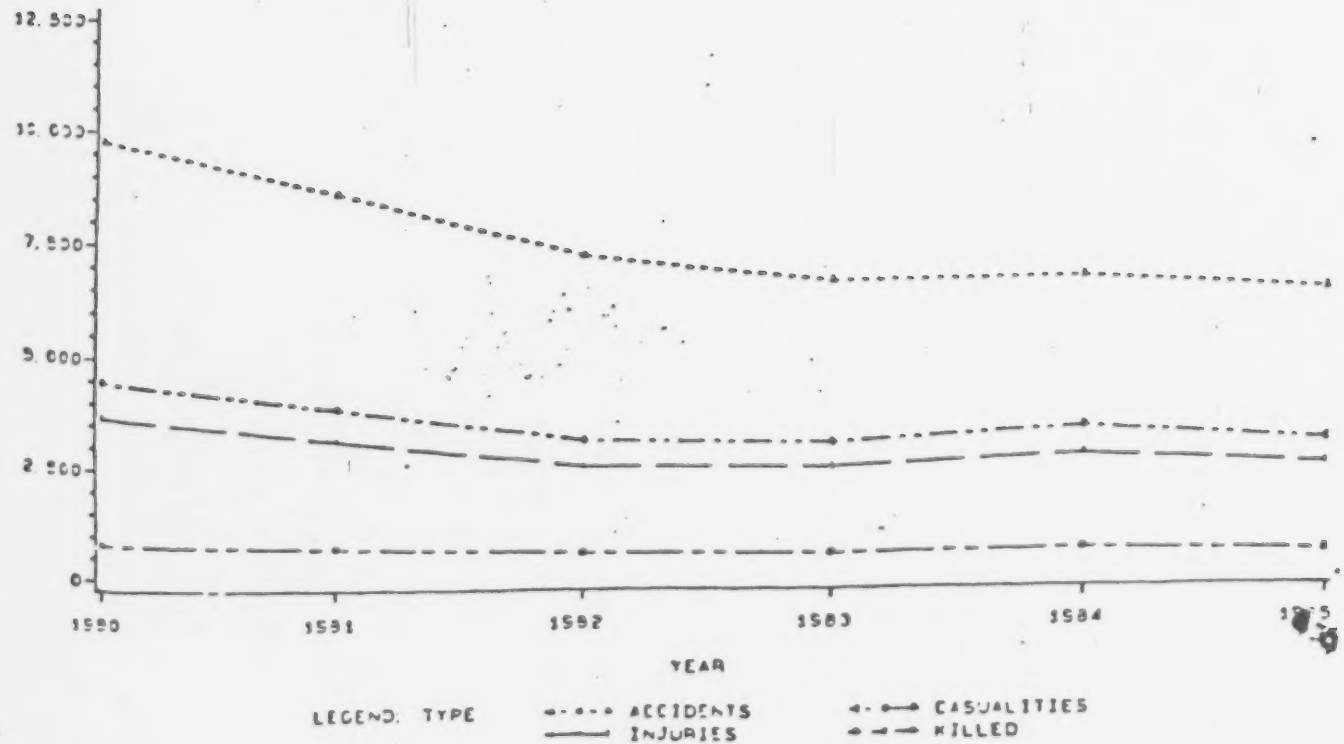

FIGURE 1. SUMMARY OF ACCIDENTS/INCIDENTS AND CASUALTIES AT RAIL-HIGHWAY CROSSINGS, LAST SIX YEARS

TABLE 17. ACCIDENTS/INCIDENTS AT RAIL-HIGHWAY CROSSINGS INVOLVING MOTOR VEHICLES BY RAILROAD EQUIPMENT INVOLVED, PART OF TRAIN STRUCK, CIRCUMSTANCE, AND VISIBILITY

CIRCUMSTANCE

Type Consist	Consist Struck Vehicle	Vehicle Struck Consist	Part Of Consist Struck: Lead Unit	Quarter: 1	2	3	4	Unknown	Visibility: Dawn	Day	Dusk	Dark
Train (Units Pulling).	3,695	1,293	822	197	85	71	93	25	117	2,773	172	1,927
Train (Units Pushing).	281	119	60	17	10	9	21	2	12	170	15	202
Train (Standing).....	—	95	19	19	21	15	21	---	1	13	---	81
Cars (Moving).....	104	53	49	---	---	---	3	1	---	144	2	11
Cars (Standing).....	---	6	5	---	---	---	1	---	1	4	1	---
Light Locos (Moving)..	323	110	99	---	---	---	7	4	13	237	17	171
Light Locos (Standing)	---	7	7	---	---	---	---	---	---	2	1	3
Other.....	1	---	---	---	---	---	---	---	---	1	---	---
Total.....	4,410	1,693	1,061	233	116	95	146	32	144	3,344	208	2,397

Note: The "Lead" unit is the first unit to occupy the crossing.

TABLE 18. ACCIDENTS/INCIDENTS AND CASUALTIES AT RAIL-HIGHWAY CROSSINGS INVOLVING MOTOR VEHICLES BY TRAIN SPEED AND TYPE OF TRAIN

	----Freight----			---Passenger---			-Yard Switching			-----Other-----			-----Total-----		
Speed Of Consist	A/I	Kld	Inj	A/I	Kld	Inj	A/I	Kld	Inj	A/I	Kld	Inj	A/I	Kld	Inj
Standing.....	69	8	34	---	---	---	25	4	9	14	---	5	108	12	48
1-9.....	881	10	143	17	---	1	514	11	122	354	5	68	1,566	26	334
10-19.....	812	21	349	19	---	1	153	---	60	161	---	62	1,145	21	472
20-29.....	958	43	499	51	6	19	34	---	15	84	2	49	1,127	51	582
30-39.....	856	89	397	45	2	14	6	1	4	35	7	14	942	99	429
40-49.....	690	138	307	25	6	6	5	---	3	35	6	14	755	150	330
50-59.....	234	64	115	17	2	4	---	---	---	10	7	5	261	73	124
60-69.....	56	16	23	42	8	23	---	---	---	2	---	---	100	24	46
70-79.....	9	5	3	48	18	20	---	---	---	---	---	---	57	23	23
80-89.....	---	---	---	3	---	---	---	---	---	---	---	---	3	---	---
90 and over.....	---	---	---	2	1	---	---	---	---	---	---	---	2	1	---
Unknown.....	14	---	5	3	---	---	5	---	1	5	---	1	27	---	7
Total.....	4,379	394	1,875	272	43	88	742	16	214	700	27	218	6,093	480	2,395

Note: "Other" includes mixed trains, work trains, light locomotives, single car or cut of cars

TRAIN SPEED DATA

TABLE 55. TOTAL CROSSINGS BY MAXIMUM TIMETABLE SPEED

Timetable Speed	Crossings
1-5	9,392
6-10	30,324
11-15	14,727
16-20	14,966
21-25	22,301
26-30	23,895
31-35	14,052
36-40	20,930
41-45	4,569
46-50	17,601
51-55	2,500
56-60	9,954
61-65	1,195
66-70	3,859
71-75	716
76-80	5,289
81-85	11
86-90	822
91-95	---
96-100	3
>100	277
Total	197,383

TABLE 55. TOTAL CROSSINGS BY TYPICAL TRAIN SPEED VARIATION

Speed Variation	Crossings
<1	3,635
1-5	55,663
6-10	50,167
11-15	21,113
16-20	18,542
21-25	10,912
26-30	11,581
31-35	5,544
36-40	6,214
41-45	2,701
46-50	5,058
51-55	1,050
56-60	2,063
61-65	696
66-70	684
71-75	640
76-80	713
81-85	56
86-90	60
91-95	--
96-100	---
>100	291
Total	197,383

NOTE: Typical speed variation is the difference between normal maximum speed and normal minimum speed.

HOUSE LEGISLATIVE ANALYSIS

THE APPARENT PROBLEM:

Michigan law allows municipalities (general law villages, home rule villages, home rule cities and fourth class cities) to set train speed limits within the municipal boundaries. This has resulted in varied speed limits throughout the state, making it difficult for train operators to operate their trains efficiently. One particular problem has been with the Amtrak passenger service between Detroit and Toledo; several municipalities along that route have set speed limits of 25 miles per hour where apparently the track could safely handle trains traveling at much higher speeds. Similarly, taking the bus from Detroit to Ann Arbor is faster than taking the commuter train. The slowness evidently has contributed to the lack of success seen on other passenger runs; people are little interested in riding trains when

travel is faster by car or bus. Passenger rail service in the state has been extended and upgraded recently, and some persons contend that the passenger speed limits must be raised if passenger train service is to complete effectively with other modes of travel.

THE CONTENT OF THE BILLS:

Under House Bills 4307,4308,4309, and 4310, passenger train speed limits set by fourth class cities (see Note, below), home rule villages, general law villages, and home rule cities could be enforced only in the absence of rules promulgated by the state transportation department under House Bill 4311. None of the bills could take effect unless House Bill 4311 were enacted.

House Bill 4311 would require the state transportation department to promulgate rules to establish maximum speed limits for railroad locomotives when used in passenger train operations. The

department would designate those portions of the railroad routes in the state on which speed limits would be applicable for passenger railroad trains. The maximum speed could vary on specified portions of a route, based on safety and other factors. The department would issue an order notifying each affected municipality of an established speed limit and its effective date, which would be at least 30 days from the date of the notice. If the municipality appealed the order, it would not take effect until after a hearing and approval or modification by the state transportation commission. House Bill 4311 could not take effect unless House Bills 4307 through 4310 were enacted.

Note: Pursuant to Public Act 334 of 1976, all remaining fourth class cities became home rule cities on January 1, 1980. However, until those cities adopt a charter pursuant to the Home Rule Cities

Act, the Fourth Class Cities Act serves as the city charter.

MCL references:

House Bill 4307 - MCL 91.6

House Bill 4308 - MCL 67.1a

House Bill 4309 - MCL 78.26a

House Bill 4310 - MCL 117.5d

House Bill 4311 - MCL 462.35

FISCAL IMPLICATIONS:

There are no fiscal implications to the state.

ARGUMENTS:

For: The bills would promote passenger rail service - a neglected form of transportation in Michigan. With increased speeds more commuters and other travelers will be attracted to trains, making the trains more profitable and less dependent on government subsidies. With a dependable and predictable ridership and greater uniformity of train regulations. perhaps more trains could run, and

transportation planning, especially in the southeastern part of the state, could be more effective.

Although some may worry about a rise in the frequency of derailments or of car-train collisions, such fears are unnecessary. Both the transportation department and the railroad passengers' association have surveyed railroad crossings along the Detroit-Toledo line, and found that most crossings have at least a gate and flashers. Moreover, the bills would not apply to freight trains with their greater potential for hazard.

Finally, the bills would not wrongly usurp local control, but rather are a logical extension of the state's current authority to regulate speeds on highways running through that local control over passenger train speeds would continue until department rules were promulgated, and that local governments could press

their cases through appeals to the transportation commission.

AGAINST: Some persons fear that as train speed increase so will accidents, especially car-train collisions. After all, tracks are not always maintained as well as they might be, and there are many more cars on the roads than there used to be. It is contended that before local control over the regulation of train speeds is removed, the department of transportation should first certify that a route is adequate to take increased speeds. Additionally, it is felt that local units should be specifically protected from liability if they no longer have control over the regulation of train speeds through their community.

POSITIONS:

The Southeastern Michigan Transportation Authority (SEMTA) supports the bills. (4-13-83)

The Michigan Association of Railroad Passengers supports the bills. (4-13-83)

AFFIDAVIT OF SPECIAL ASSISTANT TO THE ADMINISTRATION OF RAILROAD SAFETY

SUPPORTING AFFIDAVIT

I, Clarence E. Magoon, Special Assistant to the Administrator, Railway Safety and Tariff Division, MDOT, swear and affirm:

1. That the Secretary of Transportation has promulgated rules, regulations, orders or standards concerning the maximum allowable operating speeds of trains as to specific track conditions existing in isolation (49 CFR Ch. 11, Section 213.1 et al); but the Secretary of Transportation has not promulgated rules, regulations, orders or standards concerning the speeds that trains may safety travel through the City of Fenton, Michigan.

2. That said rules, regulations, orders and standards promulgated by the Secretary of Transportation concerning the maximum allowable operating speeds of

trains as to specific track conditions existing in isolation have nothing whatsoever to do with the speed of trains with reference to an essentially local safety hazard and have only to do with the actual physical properties of a safe train track.

Further, your affiant says not.

CLARENCE E. MAGOON

Dated: October 27, 1987

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE

COUNTY OF GENESEE

GRAND TRUNK WESTERN RAILROAD COMPANY,

Plaintiff, Case No. 87-89704-CZ

v. JUDGE BORRADAILE

CITY OF FENTON, MICHIGAN,

Defendant.

The deposition of CARL S. HAMMOND, TAKEN BEFORE ME, Daniel E. Ripka, CSR-2367, on Monday, October 12, 1987, at the offices of Douglas J. Callahan, Esquire, 242 West Caroline Street, Fenton, Michigan, commencing at or about 2:08 p.m.

APPEARANCES:

GREGORY A. ROBERTS (P33984)
Grand Trunk Western Railroad
1333 Brewery Park Boulevard
Detroit, Michigan 48207-2699
Appearing on behalf of Plaintiff

DOUGLAS J. CALLAHAN (P25350)

242 West Caroline Street

Fenton, Michigan 48430

Appearing on behalf of Defendant.

Monday, October 12, 1987

Fenton, Michigan

2:08 p.m.

CARL S. HAMMOND, a witness herein, was called for examination, and after having been first duly sworn was examined and testified on his oath as follows:

MR. ROBERTS: Gregory Roberts on behalf of the Plaintiff Grand Trunk Western Railroad Company. Let the record reflect this deposition is being taken pursuant to notice for all purposes allowed under Michigan General Court Rule.

Mr. Hammond, I'm going to ask you a series of questions. If at any time you don't understand a question or want me to rephrase it, just say. I'll be happy to re-ask it.

All your remarks must be verbal so the

court reporter can take them down, and we can't have any hmp-hms or uh-huhs, because they don't show up on the record.

If at any time you want a break, just state so and we can go off the record momentarily.

EXAMINATION

BY MR ROBERTS:

Q. Would you please state your full name an address for the record?

A. Carl S. Hammond. 242 Ponchartrain, Fenton, Michigan.

Q. And how long have you lived at the Ponchartrain address?

A. Thirty-two years.

Q. Is that equivalent to the length of time you've lived in Fenton?

A. Yes, exactly.

Q. Are you presently employed?

A. Yes.

Q. Where do you work?

A. U.S. Postal Service.

Q. Is that in Fenton, Michigan also?

A. In Fenton, yes.

Q. How long have you worked there?

A. Thirty years.

Q. In addition to you postal work are you currently a member of the political community in Fenton?

A. Yes, I am the mayor of the City of Fenton.

Q. And how long have you been mayor?

A. Since November of '85.

Q. And that was the result of an election, I take it?

A. Yes.

Q. Prior to being mayor of the City of Fenton did you hold any other political offices?

A. Yes, I was Fenton city councilman from '83 to '85.

Q. Okay. Do you have a ward system here for council?

A. No.

Q. Okay. So you would be elected as a councilman at large?

A. Right.

Q. Prior to your service as a city councilman any other political service?

A. No.

Q. Do you hold any appointed offices at all other than mayor in the City of Fenton.

A. No.

Q. Do you have what we would described as a strong mayor system in Fenton?

A. No.

Q. Youhave a city administrator then?

A. Yes.

Q. And who is the city administrator?

A. Ed Koryzno.

Q. Approximately how many hours in an average week, realizing there's some variation, do you devote to your mayoral duties?

A. Probably about twenty hours a week.

Q. And you've-been mayor against since November of '85?

A. Yes.

Q. Would you briefly describe what the mayor of the City of Fenton does?

A. Makes many decisions on zonings, and such as that. He does a lot of protocol things, goes to different functions, meets with the city manager quite often on different problems of the city, works with the city attorney on any such problems.

Q. How many menbers are there of the city council?

A. Seven members.

Q. Is the mayor a permanent member of the council?

A. Yes.

Q. The mayor does have a vote?

A. Yes.

Q. Does the city manager have a vote?

A. No.

Q. So while you don't have full administrative control of the city you are an active member regarding decisions that are made?

A. Yes.

Q. Those include ordinance decisions, don't they?

A. Yes.

Q. Do you recall who the members of the council were as of October of 1986?

A. October of '86? Yes, they were Sue Susek, Franklin Adams, Ed Krzminski, Harry Bourne, Thomas Edwards. We had one vacancy at that time.

Q. Has that vacancy been filled?

A. Yes, it has.

Q. And who sits there?

A. Patricia Lockwood.

Q. Was that a result of an election?

A. An election in November of '86.

Q. How often does the council meet?

A. The second and fourth Monday of every month.

Q. And approximately how many people live in the City of Fenton?

A. About 8900 now, I would assume.

Q. As a municipal unit under the state laws, do you know if the City of Fenton

qualifies for a fourth class city, or what the classification is?

A. I don't really know the classification.

Q. Did you have a city engineer in 1986?

A. Yes, we did.

Q. And who was that ?

A. I believe in '86 it was Aries, what is it, Aries, Lewis & Company out of Ann Arbor.

Q. So you had an engineering firm on retainer--

A. Yes.

Q. --that consults for the city?

A. Yes.

Q. Who was your police chief then?

A. Police Chief Gerry Cattaneo.

Q. And he is still police chief, correct?

A. Yes.

Q. The city council, do they vote on the personnel that the city ultimately hires?

A. No. The city manager hires everybody but the city attorney.

Q. Okay. And that would include the engineering firm we spoke of?

A. Yes. It's usually with council approval.

Q. Do you know how many railroad crossings there are in Fenton?

A. Seven.

Q. Are those all Grand Trunk

A. Yes.

Q. They've been here your whole life, haven't they?

A. Yes.

Q. As regards October 13th, 1986, there was a city council meeting. I'm going to ask youto assume that. And at that city council meeting there was an ordinance passed to regulate the train speeds through the City of Fenton. Are you familiar with that?

A. Yes, very much.

Q. And relative to the time and date, you were at that city council meeting, weren't you?

A. Yes, I was.

Q. Was that the first council meeting where such an ordinance was discussed?

A. It's the first council meeting where such an ordinance was discussed, yes, to my knowledge.

Q. Prior to that council meeting then were there discussions concerning train crossings in Fenton?

A. There has been for many years.

Q. Okay. And would the difference be then that at the October 13th, 1986 meeting was the first time an ordinance was discussed as far as resolving the problem?

A. To the best of my knowledge, yes.

Q. Outside of the council meetings do you ever recall participating in any meetings or conversations where a train speed ordinance was discussed?

A. No.

Q. So your sole input into that aspect of regulation would have been at the council meetings?

A. Right.

Q. Do you recall who first broached the subject of a train speed ordinance?

A. It was Edward Krzminski, councilperson.

Q. So am I to understand that the ordinance was brought up, discussed and passed at one meeting?

A. I believe it was tabled one or two times.

Q. So there was more than one meeting at which this ordinance was discussed?

A. Yes.

Q. And if the ordinance was passed on October 13, 1986, these discussions would have necessarily preceded that meeting?

A. Yes.

Q. Are the minutes of the meetings recorded?

A. Yes, they are.

Q. And who is secretary?

Q. The city clerk would handle that.

Q. And the city clerk retains these records --

A. Yes.

Q. --to date?

A. Yes.

Q. You wouldn't dispose of records a year or two old, would you?

A. No.

Q. Did you attend all the council meetings through September and October of 1986, do you recall?

A. Yes, I did.

Q. And was testimony taken by any persons in front of the council regarding the passage of the ordinance?

A. I can't recall if anybody got up and spoke on that or not.

Q. Okay. Was the engineering firm, to your knowledge, ever retained to do a report, survey, memorandum, anything to do

with the Leroy Street crossing through the City of Fenton?

A. You mean pertaining to this ordinance?

Q. Right.

A. Not to my knowledge.

Q. Did the chief of police or a representative of his department speak before the council regarding a train speed ordinance?

A. I don't recall him, no.

Q. Would it be fair to characterize the council discussions regarding this as contained solely within council chambers?

A. Yes. Yes.

Q. Did the discussions surrounding this ever consider alternatives to the train speed ordinance?

A. Well, the council at that time never -- they talked about it at that time, yes, alternatives. But I think the climax of the thing was through years of trying to work with the railroad on trying to solve this problem.

Q. Is the problem one of Leroy Street, or all the crossings through Fenton?

A. I think Leroy Street is the basic problem of most of the problems, but all seven crossings have to be addressed as far as the train speed goes.

Q. And why is that?

A. Well, I believe that those crossings are just as bare as the rest of the crossings when there's no train speed.

Q. Okay. Are there any crossings in Fenton that aren't protected by automatic signal devices?

A. Yes.

Q. And which are those, if you recall?

A. We have signals at Beach Street, Poplar Street, Lemen Street and Leroy Street.

Q. Do the other crossings have stop signs at them?

A. Yes.

Q. And when the electronic signals from a flashing unit at a train crossing are

operating state law requires a motorist to stop, do they not?

A. Yes, they do.

Q. So there is currently a stop requirement in existence at every crossing in the City of Fenton?

A. Yes, there is.

Q. How many times in the last four years, to your knowledge, has the City of Fenton applied to the Michigan Department of Transportation to come out and inspect the crossings?

A. I really don't know exactly.

Q. Would it surprise you if it's never been done?

A. Would you repeat the question?

Q. Would it surprise you if the City has not formally requested the Michigan Department of Transportation to inspect those crossings within four years?

MR CALLAHAN: I object to that question --

THE WITNESS: Yes.

MR. CALLAHAN: -- because you're assuming something that's not in evidence.

But he can answer the question if he's able to.

Q. (BY MR. ROBERTS): Since the passage of this ordinance such a request has been made; it that correct?

A. I assume it has been.

Q. Have you ever reviewed the prior reports that were made by the Department of Transportation regarding Leroy Street crossing?

A. I've read a number of reports on that crossing through the last four years.

Q. And have any of those reports ordered gates to be put into that crossing?

A. I can't say there's been any order, but I think there's been a lot of requests.

Q. Okay. Requests by who?

A. The City. The citizens have requested the council to investigate it.

Q. Has the city of Fenton at any meetings that you've attended allocated any money toward crossing protection at the crossings in Fenton?

A. Yes, they have.

Q. And do you know approximately how much money that is?

A. I think it was about $35,000.00

Q. And which crossing is that?

A. The Beach Street crossing.

Q. And subsequent to that has the city allocated any other amounts of money to other crossings?

A. Not unless it was through the form of a grant.

Q. In addition to the lights on Leroy Street do you have any knowledge as to whether anybody has petitioned the local road authority to erect stop signs there?

A. No, I don't.

Q. Has the council ever discussed a referendum to present to the citizenry to vote or earmark money specifically for crossing gates at Leroy Street?

A. No, not to my knowledge.

Q. And why is that?

A. Well, I feel that the city works with the railroad, and it's a railroad -- the biggest responsibility falls on the railroad to put those gates up.

Q. Are you aware that the railroad of itself can't erect crossing safety devices?

A. Yes, I am.

Q. Then how do you reach the conclusion that it's the biggest responsibility of the railroad?

A. Well, I think the costwise.

Q. Is it a matter of cost, or is that, to your knowledge, the reason that you say that this is a railroad responsibility is a function of cost?

A. Well, as far as looking at it from the viewpoint of the city the cost is always involved. And from that viewpoint the city would hope that the railroad would to -- put the money into the crossing.

MR CALLAHAN: And I would like to interject an objection, because the questions that being asked of this witness are questions of law, and he obviously he is not a lawyer and he can't be expected to answer those questions, nor could a lawyer who hasn't looked up the question.

But I direct counsel to Washtenaw Road Commissioners versus Public Service Commission 349 Michigan 667, a 1957 case that said that the railroad had the responsibility to put up the gates.

MR. ROBERTS: What case was that?

MR. CALLAHAN: Washtenaw Railroad Commissioners versus Public Service Commission 349 Michigan 667. It's 1957 case. I can give you a copy of it before you leave.

MR. ROBERTS: Okay.

Just for the record, the case is outdated because the laws regulating who has the authority to order signal

protection at crossings have been updated since that case was written.

Q. (BY MR. ROBERTS): Has the council ever requested in your presence that any city department or agent of the city investigate alternative financing, either through the federal government or the state government, to finance crossing protection at Leroy Street?

A. Not to my knowledge.

Q. If such financing was available, would it be your recommendation as a member of the council that the city investigate such financing?

A. I would say yes right now without seeing any further documents. But I would have to look into all of the aspects of the whole thing before I could say for sure whether I would agree to it or not.

Q. I'm going to ask you to assume that the ordinance passed by the city to enact a train speed law is Ordinance No. 459 that

was madeeffective October 28th, 1986, and against was passed on October 13.

Do you recall what way you voted on that ordinance?

A. I voted yes.

Q. And yes being to enact the train speed law?

A. Absolutely.

Q. What engineering data did you rely on in order to reach that conclusion?

A. Well, the safety aspect. All the safety records that we've had showed that there has been many problems on that railroad crossing, that special railroad crossing. But I took into consideration the whole city with several railroad crossings, and that's what I based my feelings on.

Q. Okay. As regards the safety aspects, what reports did you look at?

A. The accident report, and near accidents.

Q. And these are accident reports that occurred on Leroy Street crossing?

A. All the crossings.

Q. And near accident reports?

A. Well, I won't say that's reports. That's --

Q. Stories?

A. Stories from people in town, and such.

Q. And how many of these accident report -- Did you look at them personally?

A. No.

Q. Were these presented to the council in some format?

A. We've read most -- Anything that comes to the council it comes through our attorney, whatever we read. I really can't remember if there's been --

Q. What do you remember reading in the way of these safety reports or accident reports?

A. Well, I know we lost one lawsuit because of the -- I think that was the -- I know one case here that we lost -- for

the Scott Dennis Leach we lost a lawsuit there because based on the failure to provide crossing gates for the traffic.

Q. And what year was that, do you recall?

A. It was 1968.

Q. Okay. And not being a lawyer you don't know if there's been any changes since 1968 affecting legal responsibilities at crossings, do you?

A. No, I don't.

Q. Q. Okay. How many of those safety reports that you read found that the train speed was the causative factor of any of these accidents?

A. To my knowledge, none.

Q. And what other avenues were investigated by the council at the council meetings other than train speed to determine what factors caused these accidents?

A. Well, I think that they just went strictly on -- I think the whole council went on the , and we usually do go on the

feeling of the residents. And there's been so much upheaval about these railroad crossings over the years that -- and I think this had a big bearing on the situation.

Q. There has been some, some bad accidents at Leroy Street?

A. Yes.

Q. This engenders a good deal of community concern, rightfully so, does it not?

A. Right.

Q. This community concern manifests itself in political pressure on the local officials, doesn't it?

A. To a point.

Q. And as is common among cities, very often the officials act or choose not to act based on a review of factual information, correct?

A. Could you repeat that ?

Q. Okay. We'll try to rephrase that.

When the populace is concerned about

a problem and brings it up to the local officials, those officials then review that problem and can choose to act or not to act, correct?

A. Uh-huh (yes).

Q. What review was done of train speed specifically to determine whether or not the action of enacting a train speed law addressed the real concerns?

A. Well, I think enacting the train speed law was one effort we had to try to negate the problem we have there.

It's not only a problem with accidents, which is the biggest thing, but we also have the liability problem on that railroad, and so we have to take that all into consideration too.

Q. So to a certain extent, and you have to excuse the phrasing, the City of Fenton was also covering its own problems with liability hopefully by enacting this law?

A. No. No. No.

Q. Then clarify my misunderstanding.

A. I mean I think that we, as council people we have to consider what our liabilities are and what they aren't. And this enters into the picture of the railroad. Now, it's not the main factor, it's another phrase of the whole thing that enters into the picture that we do have a liability there, and what can we do to -- what alternative do we have to change it.

Q. And there's been at least one accident there since the train speed law was passed, correct?

A. I understand there has been, yes.

Q. And the train speed law didn't prevent that accident, did it?

A. No, but there was no -- It wasn't a fatal accident. Most people feel that that was the reason for it.

Q. Prior to the train speed rule not all those accidents were fatal either, were they?

A. That's true.

Q. There are many other facts or circumstances that give rise to accidents other than train speed, aren't there?

A. Uh-huh (Yes). Yes. But I'll restate that. I really don't know too much about that accident, so I don't know what the causes of that were, so I really probably shouldn't comment.

Q. Is it fair to say that as a member of the council and a member of the council as it consisted of the persons voting for the ordinance, you don't really know that much about any of the accidents in a detailed sense, is that fair to say?

MR CALLAHAN: I'd have to object to that, because the way you left that question is open-ended and it doesn't -- you don't specify precisely what knowledge he does have about the community affairs, and the accidents that have occurred on various railroad crossings, his duty as a safety officer to the city to investigate things and discuss things with people in the

city. And just to ask the question in that open-ended manner I'd object to, because it doesn't call for a responsive answer.

Q. (BY MR. ROBERTS): Are your safety officer of this city?

A. No, I am not.

Q. Is there a safety officer?

A. Not to my knowledge.

Q. Was any person charged by the city going out and investigating these accidents from an objective viewpoint?

A. I wouldn't say for sure. I don't know who, who was...

Q. We have police investigations, correct?

A. Yes.

Q. And we've already testified that none of these police investigations has pinpointed the train speed as the causative factor, have we not?

A. To my knowledge.

Q. Every one of these crossings has either automatic signal requirements or signing requirements that require persons to stop at them, correct?

A. Yes, they do.

Q. If persons obeyed those signs and those automatic signal devices and came to a stop, made observations for their own safety, do you think that they would proceed across those crossings in front of an oncoming train?

A. I everybody followed the law we'd never have -- we wouldn't have accidents, no.

Q. So one of the problems is that persons don't necessarily follow the law?

A. Absolutely.

Q. Is that fair to say?

A. Absolutely.

Q. Did the council discuss that?

A. That's been -- I can't remember. I would say I don't know, because I don't know what the minutes are in those

meetings. I don't know if that was brought up or not.

Q. Do you recall whether the council has ever requested the city police department to increase enforcement of traffic ordinances at railroad crossings?

A. Not to my knowledge, the council has never looked at...

Q. Did the council ever request records from the police department other than the police reports as to past activity of the police department in issuing citations, say, for failure to yield?

A. No, not to my knowledge.

Q. What documentary sources did the council rely on in investigating and passing this ordinance, other than the accident reports and citizen complaints that we already heard about?

A. Basically I think it was due to what the citizens wanted. They felt it's what the citizens wanted.

Q. No railroad specialist, whether

employed by a railroad company, or other persons were asked to give input into this decision?

A. No.

Q. Anybody from the Michigan Department of Transportation?

A. They were notified, but they were not asked to give input.

Q. Anybody from --

A. Not to my knowledge.

Q. Did you get an opinion from your attorney's office as to whether or not this law was --

A. Probably only on the legality of it.

Q. Was the vote unanimous?

A. Yes, it was.

Q. Subsequent to the October 13th, 1986 meeting has the train speed ordinance come up for reconsideration before the council?

A. Since it passed, you said?

Q. Right.

A. No.

Q. Have any follow-up reports, consultants, studies, surveys, or information of any other sort been given to the council?

A. No.

Q. So the train speed ordinance as it exists today is solely a result of the initial council inquiry and decision?

A. Right.

Q. Did the council ever investigate the cost of erecting gates at that crossing themselves?

A. I assume they have, but I would not -- It's been -- It is something that has always been worked with the railroad whenever there is cost factors involved. So I really can't say for sure if they have got a confirmed price on that.

Q. It is fair to say that virtually any city of eight thousand persons that has railroad service has numerous crossings in its vicinities?

A. I don't know how rare it is to have

seven, you know, in one town within a mile, or whatever it is.

Q. Railroad crossings themselves for the motoring public are a very common occurrence, are they not?

A. Uh-huh (Yes.) Yes.

Q. And in an industrial state like Michigan you see them everywhere, do you not?

A. Yes.

Q. Is there anything unique about railroad crossings that sticks out in your mind?

A. Inconsistency with gates, and such.

Q. Has the council, to your knowledge, ever required any of the city departments since the enactment of this ordinance to go out and to maintain railroad crossings on the portion of the highway that is under city jurisdiction, such as pavement markings, brush clearing, and signing of crossings?

A. I'd have to say I don't know.

Q. Other than passing train speed ordinance has the city taken any other steps toward increasing safety at railroad crossings in the City of Fenton?

A. Only what they've worked through MDOT.

Q. No school presentations have been made, I take it?

A. Not to my knowledge.

Q. Has anybody undertaken to educate the local populace through the newspapers of the dangers associated with railroad crossings?

A. I think it's well documented in the newspapers about our railroad crossings through the years.

Q. To your knowledge were the various persons injured in those accidents all residents of the City of Fenton?

A. If I can thumb through this I could tell you exactly.

No, to my knowledge I don't think they were all residents of the City of Fenton.

Q. Okay. And just for the record, you're

referring to documents to refresh your memory. Can you tell us what those documents are?

A. It's the history of the crossing.

Q. And do you know who compiled that?

A. I believe our city attorney compiled it.

MR. CALLAHAN: Just for the record, I sent that on to the council and got it from another attorney who had did research on that questions, the history it.

MR. ROBERTS: And for the record that attorney is Bob Beltz?

MR. CALLAHAN: Yes.

MR. ROBERTS: And those documents were compiled in the course of a plaintiff's suit against the City of Fenton and the railroad as the result of a traffic accident?

MR. CALLAHAN: That's right.

MR. ROBERTS: And they're contained in that plaintiff's attorney's brief against the city and the railroad.

MR. CALLAHAN: I think it was a mediation summary.

MR. ROBERTS: Let the record reflect that mediation summaries are adversary proceedings and that the information contained in those documents is inadmissible as a matter of law.

Q. (BY MR. ROBERTS): Is it fair to say then that the City council didn't review any other alternative in this situation other than imposing the train speed ordinance?

A. As far as deep investigation into railroad crossings, and such things as that, I would say no.

Q. Was anybody on the council ever a member of a railroad company or have any specialized knowledge in railroading?

A. No.

Q. Councilman Koryzno, is that his name, one of the council member's names?

A. No. Krzminski.

Q. Krzminski?

A. Koryzno is the city manger.

Q. Krzminski, what is Mr. Krzminski's regular occupation?

A. Factory worker. Skilled trade, I believe.

Q. And Susek?

A. Sue Susek.

Q. What's her occupation.

A. She's an accountant.

Q. Edwards.

A. Salesman, I believe.

Q. Bourne?

A. He works for General Motors.

Q. And Adams?

A. He works for General Motors.

Q. Do you have any knowledge of relative train stopping speeds??

A. No.

Q. To your knowledge do any of these persons have any knowledge of relative train stopping speeds?

A. Not to my knowledge, no.

Q. Do you have any opinion as to the

difference in train stopping speed that a 25-mile-per-hour train?

A. I would say that we have had this information before us and I have read it, but I can't recall it.

Q. When did you have this information before you?

A. I can't tell you exactly. We've had information at different times. Though the last four years since I've been on the council we've always had something come up about the railroads on different occasions.

Q. Was this information written?

A. I would say yes.

Q. I'm interested in finding what was relied on in order to pass this law. Would information of that sort be part of the minutes kept in the council meetings?

A. Would you repeat that?

Q. Well, predicating it with the fact that I'm interested in whatever you relied on in order to pass this law, I'm

interested in any information you have as to relative train speeds and stopping distances.

Would this information be contained in any of the minutes kept of those meetings?

A. I do not know.

Q. And you don't recall any of this information off you head, do you?

A. No. This information about train speeds, and such, it's possible that could have been through the newspaper articles, I really don't know.

Q. As a reasonable man don't your think that the ability of trains to stop, regardless of speed, would be one of the points that should be examined before enacting an ordinance of this sort?

A. No.

Q. Why not?

A. Because I think public officials have to rely on the populace. And the populace was the ones that have been dictating to us to do something about this problem.

Q. Do you think that you've done something by enacting this train speed ordinance that is really offering the citizens a safer railroad crossing?

A. The general public feels that way.

Q. You're not untypical for an elected official. You are acting according to what you believe the population wants, right?

A. That has some input to it, yes.

Q. And the rest of the input comes from where?

A. Like I say, accident reports, liabilities of the city, and such and such.

Q. And none of these accident reports or liabilities of the city have ever pinpointed train speed as the cause of these accidents?

A. Not to my knowledge, no.

Q. But enacting the train speed ordinance does have a positive effect on the perceptions of the city, does it not?

A. I don't understand that question.

Q. The people were all for it when you enacted the ordinance, is that fair to say?

A. I wouldn't say that they were necessarily all for a speed -- They were for the city to do something, and get something under motion that would make this a safer town.

Q. Is the town safer? That's the question.

A. I presume history will tell.

Q. Would it be fair to say that the council also acted in the least expensive possible way that they could have?

A. No.

Q. What, in your opinion, would have been the least expensive way?

A. I took that questions wrong. I thought you meant we did it because we thought it would be a cheap way out. It was not done for that reason.

Q. Okay. Was it the cheap way out, anyways, though?

A. Cost never entered the picture.

Q. What does it cost to pass an ordinance?

A. Minimal.

Q. What does it cost to put up gates?

A. I could not tell you because there's never been no solid figures on that.

Q. What's it cost to have your police officers write more tickets?

A. Whatever is in the realm of doing it.

Q. Have you personally observed any persons disregard the blinking signals at any of these crossings?

A. I would have to not answer that in the affirmative because I've seen it all -- I've seen it all over the country. I mean, I've seen that happen wherever I'm at, whether it's Flint or whatever city it's in. You're going to see that regardless.

Q. Have you seen anyone go around gates?

A. I've seen that done before, yes.

Q. Of the reports you viewed, we've already established that none of them have pinpointed train speed as the causative factor. Have any of them pinpointed auto driver error as the causative factor?

A. I don't think I should comment on that. I think there's still probably some cases that are involved in that and I don't want to go on record as saying that I know what's the cause of them and what's not the cause of them.

Q. Is the city in litigation currently regarding any crossing accidents to your knowledge?

A. To my knowledge they're still in some, but I'm not sure if they've all been settled or not. That is work that is done through our insurance department.

Q. Who is your insurance company, by the way?

A. It's a risk company.

Q. Municipal Risk Management?

A. Municipal Risk Management, I believe it is.

Q. Out of Livonia?

A. I believe it's out of there somewheres.

Q. Were any federal regulations ever used or reviewed by the city council prior to passing this ordinance?

A. We were still waiting for the railroad to give us the federal restrictions, and such, which was never forthcoming from the railroad.

Q. So the railroad was dilatory or slow in providing this information?

A. We tabled this decision wither one or two occasions because we were waiting for the information as to what the federal guidelines were, and they never did present us with any.

Q. And you got it shortly after the

ordinance was passed?

A. I don't remember when or if we ever got it.

Q. Prior to passing the ordinance did you consider that information critical or not particularly important?

A. We thought it was critical at first, but when the railroad never came forth with it we assumed it never existed.

Q. Has there been a public vote as to whether or not to proceed with this law action, or the defense of this lawsuit?

A. No.

Q. Hs there been a private vote?

A. Been a what?

Q. A private decision by the council members.

A. No.

MR. CALLAHAN: I'd like to interpose an objection, because -- Maybe a clarification. I think that what you're asking is whether the council voted

publicly to defend the lawsuit. I think the mayor may be interpreting it to mean has there been a vote in an election --

THE WITNESS: Yes.

MR. CALLAHAN: -- to defend the lawsuit. Maybe if you'd get into that area you can clarify it with him.

Q. (BY MR. ROBERTS): Was there a public vote by the council to defend the lawsuit?

A. I believe so.

Q. And prior to making that public vote did they review any information I haven't heard about yet?

A. Just whatever our attorney supplied us with.

Q. Did they review the information provided by the railroad to their attorney?

A. I believe so, yes.

Q. Do you recall reviewing that yourself?

A. Absolutely.

Q. And you don't recall whether you reviewed it or not?

A. We've read so many reviews, and such, on this that---

Q. When's the next city council meeting?

A. Tonight.

Q. Are there any pending train regulations before the council?

A. No.

Q. If you'll bear with me momentarily I think we can tidy this up.

Do you know if the City of Fenton has a rule regulating how long crossings can be blocked by a passing train?

A. I believe they do have a regulation.

Q. Okay. And in your enactment of the train speed ordinance, in enacting that did you review the time limits set up by that regulation.

A. I don't -- As council we did not , not.

Q. So there was no --

A. Discussion on it.

Q. -- inquiry made as to whether the risk of accidents increased because the blockings were tied up longer?

A. Yes. There was never any discussion on that.

Q. Are there any ordinances in the City of Fenton that regulate train whistles being blown at night, or any similar duty, to your knowledge?

A. Not to my knowledge.

Q. Have you as a council member ever heard any complaints about train whistles.

A. No.

Q. Is Leroy Street a city street or a county street?

A. It's a city street.

Q. Are any of the crossings that exist in Fenton on county roads or state roads, to your knowledge?

A. No.

Q. They're all on city roads?

A. They're all on city streets.

Q. What city department is in charge of maintaining your roads?

A. The department of public works.

Q. Who is the head of that department?

A. Les Bland.

Q. Any idea how you spell that last name?

A. B-L-A-N-D.

Q. Anyone up for election this year on the council?

A. Yes.

Q. Who?

A. Myself and three other council people.

Q. And who are the other three?

A. Susek, Lockwood and Edwards.

Q. So you have a two-year term then?

A. Yes. Council are four-year terms.

MR. ROBERTS: I don't have any more questions for you, Mr. Hammond.

THE WITNESS: Okay. Fine. Thank you.

EXAMINATION

BY MR. CALLAHAN:

Q. I have just a few. Mayor Hammond, the city of Fenton is a home rule city, is it not?

A. Yes.

Q. And in your capacity as a mayor of a home rule city do you -- what sort of things do you consider before you make a vote on any issue involving public safety in general?

A. We rely on the information from the police departments, from the city manager, whatever, public input, such as that.

Q. All right. And then you testified that you've been a resident of the City of Fenton for thirty-two years?

A. Right.

Q. And during that thirty-two-period have you had occasion to personally look into accidents at railroad crossings, and to the extent of not necessarily going out

and measuring it yourself, but reading in the newspaper, talking to people, researching any materials that were provided to you on that subject, things of that nature?

A. Yes, I have.

Q. And so when you testified that the sole access to the input for your vote on the train safety speed law was information at council meetings, I believe what you were trying to say is that you also took in everything that you gathered by your own information in the last thirty-two years as well as what was said at the council meeting?

A. Absolutely.

Q. I see. Now, you have, since you've been here for thirty-two years you've probably heard about every death at a railroad track in Fenton, have you not?

A. Yes, I have.

Q. Okay. And do you have a document

there that could refresh your memory as to some of the names and dates of people that were killed?

A. Yes, I do.

Q. On October 11th, 1964, who was killed by a westbound train at the crossing?

MR. ROBERTS: I'm going to object to this whole line of questioning as irrelevant, immaterial, remote in time, and that the document that he's testifying from he hasn't testified that it's necessary to refresh his recollection, or the proper foundation of the document.

MR CALLAHAN: Well, just to answer --

MR. ROBERTS: You can answer.

MR. CALLAHAN: To answer the objection, this is relevant because the mayor is a public officer of the city, and safety is one of the main questions, along with health and welfare, that he addresses at every meeting he goes to as a city councilman.

And the history he's been able to glean personally from the railroad tracks, notwithstanding he hasn't had a personal engineer examine this and give him a written report, all these things are the basis of a decision by council members, and therefore they're admissible

As to the objection of this particular record, I think that he said that it would refresh his memory. Although it wasn't prepared by him, he has looked at it. But we'd leave that objection to be argued later. We certainly have police reports that we can bring forth to clarify questions of that nature.

Q. (BY MR. CALLAHAN): But going back to the record, you can answer the questions. On October 11th, 1964 who was killed by a westbound train at the crossing?

A. John Olski.

Q. And how about on February 22nd, 1965?

Wasn't it Frank J. McLean who was killed at the crossing on North Leroy Street?

A. In 1975?

Q. In 1965.

A. In '65. I don't have any -- I don't remember anybody killed in '65.

Q. Can we go off the record a second?

A. Oh, yes. Yes. It was Frank McLean.

Q. All right. And how about on January 21st, 1966?

A. Matthew John Testa.

Q. Was anyone killed on June 9th, 1967?

A. Thelma Leigh Joslyn and Evelyn Grace Brennon. There were two ladies killed on that track.

Q. How about on April 29th, 1986?

A. Scott Dennis Leach.

Q. And then on January 12th, 1980 who was killed?

A. Cheryl Diane Shannon.

Q. And isn't it true that William Estep was also seriously injured?

A. Yes, he was.

Q. Now, you testified to various input from the city residents. Do you recall in February of 1980 whether or not there was a petition drive signed by seven hundred and three residents of the City of Fenton?

A. Yes, there was.

Q. And did that petition say "Please sign this Petition requesting that railroad gates be put up at the Grand Trunk railroad crossing and North Leroy Street and Adelaide Street in the City of Fenton?

A. I'll testify I don't know whether it was the exact wording, but there was workings to such.

Q. All right. How about on December 16th, 1980, was Adelle Erickson the seventh fatality --

A. Yes.

Q. -- in the period from 19 -- 10-11-64 to date?

A. Yes.

Q. And on August 13th, 1982 who was

killed at the crossing? We're talking about the North Leroy Street crossing.

A. August 13 there was two young men, Jeffrey Davison and Dennis Holmes.

Q. Now, you're not an engineer, are you?

A. Nope. No.

Q. But you feel you're a rational person and able to make rational decisions based on facts that are put before you in exercising your duty as mayor and a voter for the City of Fenton?

A. Yes.

Q. And would you agree or disagree that when a moving object hits another object at a faster speed it's more likely to cause serious injury that if it's going at a slower speed?

MR. ROBERTS: I object. Calls for speculation.

Q. (MR. CALLAHAN): You can answer the question.

A. Yes.

Q. That faster moving objects cause more damage when they strike an object than a slower moving object.

A. From my common knowledge I would have to say yes.

Q. All right. Is that part of what you based your decision on in voting, your common knowledge of the damage that speeding a train can do versus a train moving at a slower sped?

A. Partly, yes.

Q. I see. Now, just addressing the North Leroy Street crossing, that crossing has now many lights to the North and south of it, how many traffic control lights?

A. North and South? To my knowledge there's three different sets of lights down there.

Q. All right. And then are there any buildings located close to the tracks in that area?

A. Yes.

Q. Can you briefly describe those buildings and where they're located?

A. Michigan Bean is on the northwest corner. There's an Action Auto store on the southeast corner. And on the northeast corner there's a little shopping area there, office buildings.

Q. All right. And you spoke of a light to the north of the tracks. Would that be near the Hotel Fenton?

A. Yes.

Q. And then there's another light, isn't there, just south of that light --

A. Yes.

Q. -- on the other side of the tracks.

A. Yes.

Q. All right. And then if a person were stopped at the light by the Hotel Fenton north of the tracks and a train were going westbound at approximately three hundred yards from the intersection would that person sitting at the light facing south

be able to see the train, or would the building block the view?

MR. ROBERTS: I object.

THE WITNESS: No.

MR. ROBERTS: Calls for speculation.

Q. (BY MR. CALLAHAN): Well, have you lived in the City of Fenton thirty-two years?

A. Yes.

Q. Have you had occasion to stop yourself at that intersection going southbound on Leroy Street near the Hotel enton? You've stopped your car there before, haven't you?

A. Oh, yes, many times.

Q. And if you were to look down the track from where the track crosses North Leroy Street and go looking west about five hundred yards, say five hundred yards precisely, could you see that train, or does the Michigan Bean block the view?

A. Visibility is very poor. I would say I'd possibly not be able to see it.

Q. Now, just from your general knowledge, is that a busy intersection, the intersection of North Leroy Street located near the railroad crossing?

A. Yes, it's our busiest.

Q. All right. And what's the speed of all the motor vehicles going north, east, south and west at that location?

A. Well, I would say it's very slow.

Q. Is it 25 miles per hour?

A. It would be - in the city the limit would be 25 miles per hour, yes, the speed limit.

Q. I see. So based on those considerations that you have in mind, or you had in mind when you made your vote for the train speed ordinance would you say that that location is a -- has a purely local safety hazard or not?

A. I would say yes.

Q. That it does have a purely local safety hazard?

A. Yes.

Q. And do you recall receiving a Rail-Highway Crossing Accident/Incident and Inventory Bulletin for the calendar year 1985 from the city attorney?

A. Yes.

Q. That's in fact a city record, isn't it?

A. Yes.

Q. It was in the agenda packet --

A. Yes.

Q. -- and it's a matter of permanent record of the city, at least public record of the city?

A. Uh-huh (Yes).

Q. Do you have a copy of that report with you?

A. No.

Q. I show you what purports to be that report that you saw. A Rail-Highway

Crossing and Accident/Incident Inventory Bulletin. Do you recognize that now?

A. Yes.

Q. Is that the one you received that's a matter of public record in the City of Fenton?

A. I remember seeing this before, yes.

Q. All right. Now, that report has numbers at the bottom of it each page, but it isn't numbered consecutively from 1 to 25, for example, is it?

A. No.

Q. All right. If you would, turn to Table 16, which would be on page 20.

A. Yes.

Q. Is that entitled at the top "Accident/Incdents and Casualties at Railway Crossings Involving Motor Vehicles By Spped of Train, Circumstance and Visibility?

A. Yes.

Q. And looking at the first line you'll see a number of, it would be the fourth line down, 20 dash 29. Do you see that on the report?

A. Yes. Yes.

MR. ROBERTS: I'm going to object unless you want to just mark the document into evidence as an exhibit, otherwise it's hearsay.

MR. CALLAHAN: All right. I'd move the admission of the document into evidence.

MR. ROBERTS: And I don't object.

MR. CALLAHAN: All right. We'd like to have that marked as our first exhibit. I'll give you a copy.

Q. (BY MR. CALLAHAN): You can still answer the question. As to a speed of 20 to 29 in the day, which is the second column over, how many accidents slash incidents and casualties are noted.

A. One.

Q. And that would be at dawn; is that right?

A. Yes.

Q. And then during the day the next column over how many at the 20 to 29 speed?

A. Twenty-two.

Q. All right. How about at 40 to 49 how many at dawn?

A. 40 to 29?

Q. 40 to 49, excuse me.

A. At dawn? Five.

Q. And how about in the day?

A. Eighty.

Q. Now, if you move to the next column from 20 to 29 how many accident/incidents and casualties at 20 to 29 at dusk?

A. One.

Q. And how about at dark at the 20 to 29 speed?

A. Sixteen.

Q. And total how many?

A. Forth.

Q. Now, what about at the speed of 40 to 49 at dusk?

A. Dusk would be seven.

Q. How about at dark?

A. Forth-seven.

Q. And how about total?

A. Total, hundred and thirty-nine.

Q. Si in reading that can you can say that if the total were forty at 20 to 29, and the total is a hundred and thirty-nine at 49 to 49, it's roughly three times as many at the 40 to 49 speed?

A. Yes.

Q. Now, turn to Table 18, next page, page -- 22 is the number at the bottom of the page.

A. Eighteen? Page 22?

Q. Yes. And Table 18.

A. Table 18, yes.

Q. On page 22. It says, "Accidents slash Incidents and Casualties at Railway Crossings Involving Motor Vehicles By

Train Speed and Type of Train"; is that correct?

A. Yes.

Q. Do you see a category for freight trains?

A. Yes.

Q. To your knowledge are all the trains that go through City of Fenton freight trains?

A. Yes.

Q. There are not passenger trains that go through the city?

A. Not to my knowledge.

Q. All right. And at 20 to 29 how many accident slash incidents and casualties were there by a freight train in which someone was killed? It would be in the middle category.

A. Forty-three.

Q. And how about at from 40 to 49 how many were killed?

A. Hundred and thirty-eight.

Q. So again that's close to three times as many --

A. Yes.

Q. -- at the higher speed; is that correct?

A. Yes.

MR. CALLAHAN: All right. Can I have that document -- I would like to have that marked an exhibit. (Defendant's Deposition Exhibit No. 1 was marked for identification by the reporter.)

Q. (BY MR. CALLAHAN): Now, I'm going to show you another document, and you tell me whether nor not that document was provided to you as an official business record in the City of Fenton in an agenda packet?

A. I believe -- I have seen this before someplace, yes.

Q. All right. Is that the one that, a copy of -- does it appear to be a copy of

the one you have in your agenda packet record?

A. Yes.

Q. And what does that report purport to show?

A. The accidents on Leroy Street in the City of Fenton, times and dates.

MR. CALLAHAN: All right. And I propose this as our next exhibit. Do you have any objection?

MR. ROBERTS: None, as long as it's admitted for the limited purpose referring specifically to the information on it.

MR. CALLAHAN: All right. I'd move that be marked as an exhibit please.

(Defendant's Deposition Exhibit No. 2 was marked for identification by the reporter.)

Q. (BY MR. CALLAHAN): Now, I show you another report that -- and I'll ask you

whether you have seen this before in your agenda packet?

A. Yes.

Q. Would you identify that? Who wrote that report?

A. William Petring, consultant engineer.

Q. And what day of the year is it dated?

A. November 24th, 1984.

MR. CALLAHAN: I'd move to admit that into evidence.

MR. ROBERTS: I object. It's hearsay. It's inadmissible. It's not a business record. It wasn't requested by the city. It's a record prepared for a plaintiff's attorney for a lawsuit, and it's been gleaned out of plaintiff's attorney files and now is presented as a business record. It has absolutely nothing to do with business records. It's not prepared or compiled in the normal or routine course of the city business. The person is not here to examine. It's merely hearsay.

MR. CALLAHAN: I think that we've laid a foundation and we'll let the court rule as to whether or not this is an official business record. But we would like to have that marked as an exhibit.

(Defendant's Deposition Exhibit No. 3 was marked for identification by the reporter).

MR. CALLAHAN: And I have no further questions.

EXAMINATION

MY MR. ROBERTS:

Q. What does a home rule city mean to you, Mr. Hammond?

A. Home Rule City means that we're self-governing.

Q. And all city rights are granted or controlled by the state in which they're located, are they not?

A. Yes.

Q. So you're a home rule city at the behest of the State of Michigan, which sets out the laws for municipalities?

A. Yes.

Q. Now, realizing you're not a lawyer, but in your opinion does the state constitution have more authority than the federal constitution?

A. No, I would say not.

Q. And do you think that the City of Fenton has more authority because it is a home rule city than the federal constitution?

MR. CALLAHAN: Well, I think now you're starting to get into a legal question. Really, you're asking him to answer questions he's not qualified.

MR. ROBERTS: Objection noted.

Q. (BY MR. ROBERTS): If you can't answer, just say you can't answer. I don't care.

A. I'd say no then.

Q. You don't really know, nor have you give much thought to the constitutional problems that are raised by this lawsuit; is that fair to say?

A. Yes.

Q. Your concern is one of Leroy Street, right?

A. No, it's the City of Fenton, all crossings.

Q. Okay. Your main concern then is the City of Fenton crossings, and the larger picture of the operation of the railroads in this country didn't figure into the Fenton city council actions on October 13th; is that fair to say?

A. Yes.

Q. Okay. You mentioned on cross-examination that you relied on police reports; is that correct?

A. Yes.

Q. And those police reports concern the accidents at Fenton Street (sic.). That you relied on the city manager's investigation. Did he testify before the council regarding this ordinance?

A. No.

Q. So you didn't really rely on the city manager?

A. No, we relied on input, any input that's come to us through the years.

Q. Okay. You are not specifically speaking of identifiable input, but rather the sum total of everything that's happened to you and the City?

A. Yes.

Q. And so when you say that part of this input includes what you read in the newspapers, you're not relying on that for any expert conclusions, are you?

A. No.

Q. As a good politician you wouldn't believe everything you read, is that fair to say?

A. Absolutely.

Q. The accident in 1964, how fast was the train going?

A. I have no idea. I don't remember.

Q. Any of these accidents do you know how fast they were going?

A. Not right offhand, no.

Q. Which of the accidents were people drinking, the drivers of the automobiles, do you recall?

A. I really can't answer that because...

Q. Is the signal protection at Leroy Street as of last October, October '86, the same as it was in 1964, as a long-term city resident?

A. I believe not.

Q. It's quite a bit different, isn't it?

A. Yes.

Q. So when we speak of prior accidents, I've just mentioned at least three factors that may have input into an accident, correct?

A. Yes.

Q. Did you consider all those before you passed the train speed ordinance?

A. We considered everything we had before us and everything that we had received.

Q. What you really have is a crossing where there's been numerous accidents, and

an action by the city council to address the problem, right?

A. Yes.

Q. Whether or not it's a solution to the problem is not as important as showing that the city council address the problem?

A. That's right.

Q. Because you've got a clamoring public out there? You had seven hundred persons sign the petition, correct?

Q. Did the city council back in 1980 ever consider a referendum at that time to provide money to finance gates at Leroy Street?

A. No.

Q. Did they ever put up a stop sign, which is within the city authority to do?

A. On that crossing?

Q. Right.

A. I don't recall.

Q. It's possible for the city now to put up a stop sign there this week and stop every car that comes by there, right?

A. I would assume that we would have that authority if we...

Q. Of all these accidents how many of these persons stopped at the crossing and then proceeded, do you know?

A. I can't answer that.

Q. How many times did the cars run into the train as opposed to the train run into the cars?

A. I don't know that question., not without reviewing the accidents.

Q. And do you know how much a locomotive alone weighs?

A. I have no idea.

Q. Do you think speed makes that big of a difference if a car strikes a train as opposed to a train striking a car?

A. In my personal feelings, I would say yes.

Q. If a two hundred and fifty ton object strikes a car at 25 miles an hour what do you think the result is going to be ?

A. Depends on where it hits the car.

Q. Did the council consider the possibility of increased derailments by trains due to traveling at a slower speed.

A. Not to my knowledge.

Q. You're aware that the trains carry tank cars full of hazardous substances, are you not?

A. I'm well aware of that.

Q. You don't know the difference between a freight train and a yard train, do you?

A. No, I don't.

Q. Or a switching movement?

A. No.

Q. There are no passenger trains through Fenton?

A. Not to my knowledge.

Q. There may be other trains other than straight freight trains, though; is that correct?

A. Possibly.

Q. We went down a series of reports. None of these reports were provided to you

prior to enacting the train speed law; is that correct?

A. I can't answer that. I've seen -- There's been things put in our agendas off and on through the time. I really don't know exactly what dates.

Q. Assuming that I provided the statistical information to your counsel, and I did so after the ordinance was passed, would you search your memory once more and try to remember whether or not you ever say that statistical information prior to passing this ordinance?

A. I'd try to remember if I had seen it or not, yes.

Q. And those statistics of Defendant's Exhibit No 1 detail a lot of train accidents, don't they?

A. Yes, they do.

Q. At all kinds of crossings and different speeds, right?

A. Yes.

Q. There's quite a few train accidents,

as shown by the numbers contained there, right?

A. Uh-huh (Yes). Right.

Q. And they span the whole country, do they not?

A. Yes, they do.

Q. Do you still think that accidents at railroad crossings are a local problem?

MR. CALLAHAN: Objection. He never testified that accidents at railroad crossings were a local problem. He said that North Leroy Street crossing has a purely local safety hazard.

Q (BY MR. ROBERTS): All crossings are located someplace, obviously, right? They all have some local character, do they not?

A. No.

Q. All crossings do not have some local characteristics? They're all on a road?

A. They're all on a road. But some are in the country, some are in cities. Some

are in highly populated areas. Some are in less populated areas.

Q. And each of those has its own local circumstances and characteristics, right?

A. Well, yes. I would say yes to that.

Q. But the problems of grade crossings between trains and cars is not a unique problem, judging by those statistics, is it?

A. No.

Q. I'm going to show you what was marked Defendant's Exhibit No. 3 and ask what conclusions can you draw from that regarding train speed?

Excuse me, Defendant's Exhibit No. 2.

A. None.

Q. And what can you tell about the circumstances of those accidents other than the direction of the train?

A. Nothing. This is just strictly a list of the accidents, and the accident reports, and the times that they happened.

Q. And we've already established that the

various accidents over the time periods we're discussing don't have that such in common, other than the fact they're all at Leroy Street, right?

A. All the one we discussed were at Leroy Street, yes.

Q. If there were gates at Leroy Street would you still have voted for the train speed ordinance?

A. I can't answer that. I don't know what information would be available, or I'd never make a decision without knowing what information is available, or what the general...

Q. But other than the knowledge that there were some accidents and that the public wanted some action you made the decision to vote for a train speed ordinance with little or no information, correct?

MR. CALLAHAN: I object. He's testified before the information he gleaned for thirty-two years as a resident of the

city. He's looked into various accidents that they have had. Although he's not an engineer he's had input from numerous handouts. And he's testifies to all this, so I object to repeating to ask that question. It's already been asked and answered.

Q. (BY MR. ROBERTS): You can answer over objection.

A. Ask the question again.

(The following requested portion was read back by the reporter:

Q. But other than the knowledge that there were some accidents and that the public wanted some action you made the decision top vote for a train speed ordinance with little or not information, correct?)

THE WITNESS: No.

Q. (BY MR. ROBERTS): Is the other information we're speaking of the same information that was contained on your

counselor's objection, the newspaper articles?

A. Thirty-two years of living here, and thirty-two years of accident reports and whatever you've ever heard of, or whatever, yes.

Q. Realizing that your experience has taken in many different things in your civic duty, you don't consider by any means that you are expert in any aspect of railroad highway safety, do you?

A. No.

MR. ROBERTS: I don't have any more questions.

EXAMINATION

BY MR. CALLAHAN:

Q. Just one last question. Referring to Defendant's Exhibit No. 1. On page 71 do you see a Table 56 on that exhibit?

A. Yes, I do.

Q. What's the heading on that Table 56?

A. "Railroad Crossings by Typical Train Speed Variations".

Q. And is there an indication on that table that -- how many, how many crossings were at the 21 to 25 mile per hour speed?

A. 10, 912.

Q. And how many crossings were at the 46 to 50 speed?

A. 5,058.

Q. But yet didn't you testify previously -- In other words, there's twice as many crossings at the 21 to 25 , roughly --

A. Right.

Q. -- as compared to the 46 to 50, right?

A. Yes.

Q. But yet you testified that in Table 18 as to freight trains at 40 to 49 speed there were a hundred and thirty-eight and at the 20 to 29 speed there were forty-three. So there's roughly three times as many people killed by freight trains at the higher speed than at the lower speed?

A. Yes.

MR. CALLAHAN: I have nothing further.

BY MR. ROBERTS:

Q. One more. We just heard those statistics read. Tell us exactly how much those statistics had to do with this council's decision on October 13th, 1986?

A. Well, I would just say my decision, I read every bit of input I could possibly read no matter where it came from or what it was to make my decision. I could not answer for what other council people based their judgment on.

Q. You never saw that before that vote, right?

A. I'm talking about through the years, all the information I've had. I'm not talking necessarily that document.

Q. I'm talking this information. Those statistics had nothing to do with your vote, right?

A. No, maybe not, if we didn't get them until after the council -- after the vote, no.

MR. ROBERTS: No more questions.

MR. CALLAHAN: That's it. Thanks a lot Carl.

(Deposition concluded at or about 3:27 p.m.)

CONSTITUTIONAL PROVISIONS, TREATIES, STATUES, ORDINANCES AND REGULATIONS INVOLVED IN THIS CASE

CONSTITUTIONAL PROVISIONS:

"The Congress shall have Power to lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defense and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States; ...To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes; ..." US Const, art 1, §8, cl 3.

"This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States,

shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." US Const, art 6, cl 2.

"No person, partnership, association or corporation, public or private, operating a public utility shall have the right to the use of the highways, streets, alleys or other public places of any county, township, city or village for wires, poles, pipes, tracks, conduits or other utility facilities, without the consent of the duly constituted authority of the county, township, city or village, or to transact local business therein without first obtaining a franchise from the township, city or village. Except as otherwise provided in this Constitution the right of all

counties, townships, cities, and villages to the reasonable control of their highways, streets, alleys and public places is hereby reserved to such local units of government." Const 1963, Art 7, §29.

"The provisions of this constitution and law concerning counties, townships, cities and villages shall be liberally construed in their favor. Powers granted to counties and townships by this constitution and by law shall include those fairly implied and not prohibited by this constitution." Const 1963, art 7 §34.

"The legislature shall pass no local or special act in any case where a general act can be made applicable, and whether a general act can be made applicable shall be a judicial

question. No local or special act shall take effect until approved by two-thirds of the members elected to and serving in each house and by a majority of the electors voting thereon in the district affected. Any act repealing local or special acts shall require only a majority of the members elected to and serving in each house and shall not require submission to the electors of such district." Const 1963, art 4, §29.

STATUTES:

"The Congress declares that laws, rules, regulations, orders and standards relating to railroad safety shall be nationally uniform to the extent practicable. A State may adopt or continue in force any law, rule, regulation, order or standard relating to railroad safety until such time as the Secretary has adopted a rule, regulation, order, or standard

covering the subject matter of such state requirement. A State may adopt or continue in force, an additional or more stringent law, rule, regulation, order or standard relating to railroad safety when necessary to eliminate or reduce and essentially local safety hazard, and when not incompatible with any Federal law, rule, regulation, order or standard, and when not creating an undue burden on interstate commerce." 45 USC 434.

"Each city may in its charter provide: (1) Public Ways. For the use, regulation, improvement and control of the surface of its streets, alleys and public ways, and of the space above and beneath them." MCLA 117.4h (1); MSA 5.2081 4h.

"Each city may in its charter provide: (3) For the exercise of all municipal

powers in the management and control of the municipal property and in the administration of the municipal government, whether such powers be expressly enumerated or not; for any act to advance the interest of the city, the good government and prosperity of the municipality and its inhabitants and through its regularly constituted authority to pass all laws and ordinances subject to the constitution and general laws of this state." Home Rules Cities Act, MCLA 117.4j; MSA 5.2083(3).

"It shall be unlawful for a railroad company to permit any of its trains to obstruct any vehicular traffic on public streets or highways for a longer period than 5 minutes at any one time. MCLA 466.23; MSA 22.281 (1).

ORDINANCE:

"AN ORDINANCE TO PLACE A SPEED LIMIT ON FREIGHT TRAINS OPERATING IN THE CITY OF FENTON

WHEREAS, over the years a number of fatal accidents have occurred on railroad grade crossings in the City of Fenton, and

WHEREAS, the State of Michigan has preempted the right to set maximum speed limits of passenger railroad trains but has left open to municipalities the right to set reasonable maximum speed limits on freight railroad traffic;

THE CITY OF FENTON ORDAINS:

1. That the maximum speed limit of railroad trains operating in the City

of Fenton is hereby limited to 25 miles per hour.

2. Any violation of the provisions of this ordinance shall be considered a misdemeanor punishable by up to 90 days in jail and/or a fine of not to exceed $500.00.

3. The person in immediate charge and control of a train and/or any railroad company or corporation, owning or operating any railroad in violation of the provisions of this ordinance, may be charged with the violation of the provisions of this ordinance.

4. This ordinance shall be effective fifteen (15) days after enactment and after publication required by law." Sec. 25.5-1 of the Fenton Code of Ordinances.

REGULATIONS:

"This part prescribed initial minimum safety requirements for railroad track

that is part of the general railroad system of transporation. The requirements prescribed in this part apply to specific track conditions existing in isolation. Therefore, a combination of track conditions, none of which individually amounts to a deviation from the requirements in this part, may require remedial action to provide for safe operations over that track." 49 CFR 213.1.

"Classes of track: operating speed limits.

(a) Except as provided in paragraphs (b) and (c) of this action and §§ 213.57(b), 213.59(a), 213.113(a), and 213.137(b) and (c), the following maximum allowable operating speeds apply:

(In Miles Per Hour)

Over track that meets all of the requirements prescribed in this part for -	Maximum allowable operating speed for freight trains is	Maximum allowable operating speed for passenger trains is
Class 1 track	10	15
Class 2 track	25	30
Class 3 track	40	60
Class 4 track	60	80
Class 5 track	80	90
Class 6 track	110	110

(b) If a segment of track does not meet all of the requirements for its intended class, it is reclassified to the next lowest class of track for which it does meet all of the requirements of this part. However, if the segment of track does not at least meet the requirements for Class 1 track, operations may continue at

Class 1 speeds for a period of not more than 30 days without bringing the track into compliance, under the authority of a person designated under §213.7(a), who has at least one year of supervisory experience in railroad track maintenance, after that person determines that operations may safety continue and subject to any limiting conditions specified by such person.

(c) Maximum operating speed may not exceed 110 m.p.h. without prior approval of the Federal Railroad Administratior. Petitions for approval must be filed in the manner and contain the information required by § 211.11 of this chapter. Each petition must provide sufficient information concerning the performance characteristics of the track, signaling, grade crossing protection, trespasser control where appropriate,

and equipment involved and also concerning maintenance and inspection practices and procedures to be followed, to establish that the proposed speed can be sustained in safety. (36 FR 20336, Oct. 20, 1971, as amended at 38 FR 875, Jan. 5 1973; 30 FR 23405, Aug. 30, 1973; 47 FR 39402, Sept. 7, 1982; 48 FR 35883, Aug. 8, 1983)." 49 CFR 213.9.

"This subpart prescribed requirements for the gage, alinement, and surface of track, and the elevation of outer rails and speed limitations for curved track." 49 CFR 213.51.

Supreme Court, U.S.
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No. 91-2004

In The

Supreme Court of the United States

October Term, 1992

GRAND TRUNK WESTERN RAILROAD COMPANY, a Michigan Corporation,

Respondent,

vs.

CITY OF FENTON, a Michigan Municipal Corporation,

Petitioner.

On Petition for a Writ of Certiorari to the Michigan Supreme Court

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the trial court properly granted and the Michigan appellate and Supreme Court properly affirmed respondent's motion for summary disposition in ruling that as a matter of law the City of Fenton's local train speed ordinance is preempted by the provisions of the Federal Railroad Safety Act, 45 U.S.C.A § 421 *et seq.*

PARTIES TO THE PROCEEDING AND RULE 29.1 STATEMENT

Grand Trunk Western Railroad Company's non-wholly owned or wholly owned subsidiaries are listed in Appendix A. Grand Trunk Western Railroad Company's list of parent companies and their non-wholly owned or wholly owned subsidiaries are listed in Appendix B.

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No. 91-2004

In The

Supreme Court of the United States

October Term, 1992

GRAND TRUNK WESTERN RAILROAD COMPANY, A Michigan Corporation,

Respondent,

vs.

CITY OF FENTON, A Michigan Municipal Corporation,

Petitioner.

On Petition for a Writ of Certiorari to the Michigan Supreme Court

RESPONDENT'S BRIEF IN OPPOSITION

Respondent, Grand Trunk Western Railroad respectfully asks this Court to deny the petition for a writ of certiorari seeking review of the Michigan Supreme Court's decision in this case.

STATEMENT OF THE CASE

The Grand Trunk Western Railroad Company (GTW),

operates a regional railroad through four states and with connections to various points in Canada. It is a common carrier and a rail carrier engaged in significant interstate commerce and is a "railroad" within the meaning of the Federal Railroad Safety Act, 45 U.S.C.A .§ 421 *et seq.*

The City of Fenton (Fenton) is a Michigan municipal corporation. Fenton is bisected by a single mainline track of the GTW which intersects seven highway crossings at grade spread throughout the city. Both GTW and Fenton are in complete compliance with all Michigan Department of Transportation orders concerning crossing protection at each and every Fenton grade crossing.

In the fall of 1986 the GTW operated approximately 24 regular trains a day through Fenton. The railroad's maximum speed for most classes of freight train was 50 miles per hour. The GTW maintains these tracks in a condition which conforms to the standards applicable to train operations at the cited speed. This speed is in turn reported to the Federal Railroad Administration (FRA) and published by way of railroad timetables. The FRA regulates, inspects and confirms track conditions within the framework of standards enunciated in the pertinent code of the Federal Regulations, 49 C.F.R. 213 *et seq.* GTW is in compliance with the specific maximum speed laws contained in 49 C.F.R. 213.9.

The relevant issue before this Court is whether Fenton has the authority to enact and enforce an ordinance that is contrary to 45 U.S.C.A. § 421 *et seq.* It is not, as Fenton contends, an issue of focusing on prior accidents to justify the purpose of the ordinance.

To address a perceived accident problem, the part-time City Council of Fenton, without the assistance of Michigan Department of Transportation or expert advice, enacted Ordinance Number 459,

effective October 28, 1986 to regulate speed of trains within the Fenton city limits to 25 mph.

THE CITY OF FENTON ORDAINS

1. That the maximum speed limit of railroad trains operating in the City of Fenton is hereby limited to 25 mph.

2. Any violation of the provisions of this ordinance shall be considered a misdemeanor punishable by up to 90 days in jail and/or a fine of not to exceed $500.00.

3. The person in immediate charge and control of a train and/or any railroad company or corporation, owning or operating any railroad in violation of the provisions of this ordinance may be charged with the violation of the provisions of this ordinance.

4. This ordinance shall be effective fifteen (15) days after enactment and after publication required by law.

The GTW first asked the city to retract its law and then filed suit to enjoin it based on the preemptive effect of the Federal Railroad Safety Act of 1970, 45 U.S.C.A. § 421 *et seq.*, specifically at § 434. This Act comprehensively and explicitly regulated all pertinent areas of railroad safety in controversy here. The railroad submitted as a matter of law that municipalities have no remaining power or authority to regulate train speed within their borders, regardless of conditions, and what remaining authority was allowed is vested solely and non-delegably with the state.

GTW filed the action seeking equitable relief on or about

February 26, 1987. A court clerical error had resulted in the case being technically dismissed. Petitioner would not agree to a stipulated reinstatement and asserted GTW must file a new action. GTW did so in the United States District Court, E.D., which case was ultimately assigned to Judge Newblatt as Case No. 89-CV-40040-FL.

Judge Newblatt acted to take jurisdiction of the matter and issued a temporary restraining order precluding Fenton, from enforcing the disputed ordinance. He also ordered the parties to seek reinstatement of the well developed state action. On uncontested motion, the Circuit Court judge reinstated the original action and heard the arguments. On March 13, 1989, the judge issued his well researched opinion and granted GTW's motion for summary disposition finding as a matter of law. 45 U.S.C.A. § 421 *et seq*. preempted the city from enacting enforceable local train speed laws (*see* Petitioner's Appendix).

The federal court then dismissed the concurrent action *sua sponte*.

Fenton appealed the decision to the Michigan Court of Appeals. Arguments were held on April 18, 1990 and the opinion denying Fenton's appeal and affirming the trial court was issued June 5, 1990 (*see* Petitioner's Appendix).

Fenton then sought and was granted certiorari by the Michigan Supreme Court. After review of briefs and arguments a unanimous Michigan Supreme Court affirmed the GTW's motion for summary disposition finding that local governments have no authority to regulate train speed limits.

There are *no* splits of authority among courts interpreting the Federal Railroad Safety Act's preemptive status as it pertains to local train speed limits. The various United States courts of appeals,

state appellate courts and now the Michigan Supreme Court are all in unanimous agreement. There is no pressing issue or legal question presented in this petition of such import that certiorari is necessary to resolve conflicts of laws or policy.

Specific exception is taken to the petitioner's brief, Statement of Facts, page 7 through 10 which involves essentially accident information, biased interpretations of statistical summaries, and bears up relation to factual events or relevant legal issues. The rest of petitioner's statement has no facts and is merely self serving legal conclusion unsupported by any authority or logic. It is interesting only that the issue at bar concerns legislative intent of the United States Congress, not as the city seems to think, the Michigan Legislature.

Finally, GTW takes exception to the petitioner's Statement of Facts, pages 12 through 13 because it is no longer contended by Clarence Magoon, who was not a lawyer, policy-maker, regulatory specialist or involved in setting standards for railroad speed, that local governments can set train speed limits. Mr. Magoon now recognizes the area is federally preempted and states so under oath, not by hearsay affidavits proffered by the city. The rest of the factual assertion states that 45 C.F.R. 213.9, entitled "Operating Speed Limits" is not a speed limit because the city would like subcategories which the United States Department of Transportation, the FRA and regulations have treated in a different manner.

Basically, the petitioner's stated facts have little or no basis in fact at all.

REASONS FOR DENYING THE WRIT

I.

THE TRIAL COURT PROPERLY GRANTED RESPONDENT GRAND TRUNK WESTERN RAILROAD'S MOTION FOR SUMMARY DISPOSITION IN RULING THAT AS A MATTER OF LAW THE PETITIONER CITY OF FENTON'S LOCAL TRAIN SPEED ORDINANCE IS PREEMPTED BY THE PROVISIONS OF THE FEDERAL RAILROAD SAFETY ACT, 45 U.S.C.A. § 421, *ET SEQ.*

Generally, prior to the enactment of the Federal Railroad Safety Act in 1970, 45 U.S.C. § 421 *et seq.*, (FRSA), it was well settled that the state legislatures could empower municipal authorities to pass ordinances to regulate the speed of trains through cities. In some states, with incorporated cities and larger towns, no special legislative approval was considered necessary and such ordinances were authorized by virtue of the cities' police power as to matters within their respective jurisdictions. 20 A.L.R. 1222 Section I. *See also, Erb v. Morbasch,* 177 U.S. 584 (1900). However, regulation of the railroads is also recognized as an area of commerce power regulation historically exercised by Congress. This inherent congressional power was affirmatively exercised by the passage of a comprehensive rail safety statute.

This analysis focuses on whether the FRSA, in addition to its other safety functions, preempts regulation of train speed at the state or local level.

In determining the preemptive effect of a federal statute regulating commerce, the key question is always whether Congress intended to preempt state and local regulation, *Jones v. Rath Packing Company,* 430 U.S. 519 (1977); *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218 (1947); *Wardair Canada v. Florida Dept. of*

Revenue, 106 S. Ct. 2369 (1986).

Our inquiry commences with the language of the Federal Railroad Safety Act of 1970, within which Congress states their goal.

> To promote safety in all areas of railroad operations and to reduce railroad related accidents, and to reduce deaths and injuries to person and to reduce damage to property caused by accidents involving any carriers by hazardous materials.

45 U.S.C. § 421.

In order to implement its objective of improved railroad safety, the Congress recognized that nationally uniform rail safety regulations were necessary. In that regard the following provision was incorporated into the FRSA legislation:

> Section 434. The Congress declares that laws, rules, regulations, orders, and standards relating to railroad safety shall be nationally uniform to the extent practicable. A State may adopt or continue in force any law, rule, regulation, order, or standard relating to railroad safety until such time as the Secretary has adopted a rule, regulation, order, or standard covering the subject matter of such State requirement. A State may adopt or continue in force an additional or more stringent law, rule, regulation, order or standard relating to railroad safety when necessary to eliminate or reduce an essentially local safety hazard, and when not incompatible

> with any Federal law, rule, regulation, order or standard, and when not creating an undue burden on interstate commerce.

45 U.S.C. § 434.

Generally one gleans congressional preemptive intent by examining either implicit or explicit directive in the language and structure of the federal statute itself. An additional source of reference can be found in Congress' own reporting service, detailing in this case the legislative concerns behind enactment of the FRSA. The 1970 *U.S. Code Cong. and Admin. News,* 4109-4111, states:

> ...[T]he railroad industry has very few local characteristics. Rather, in terms of its operations, it has a truly interstate character calling for a uniform body of regulation and enforcement. It is a national system.... To subject a carrier to enforcement before a number of state administrative and judicial systems in several areas of operation could well result in an undue burden on interstate commerce.

The preemptive intent of Congress in enacting § 434 was thoroughly discussed in *National Association of Regulatory Utility Commissioners v. Coleman,* 542 F.2d 11 (3 Cir. 1976). In this case, the National Association of Regulatory Utility Commissioners (NARUC) had challenged the right of the Federal Railroad Administration (FRA) to preempt state accident reporting requirements by issuing its own accident reporting requirements. After having reviewed the express language of 45 U.S.C. § 434 and the legislative history of the FRSA, the court concluded that "...these statutory provisions evidence, as the district court

determined, a 'total preemptive intent.'" *Id.* at 13.

Appellate courts which have examined the statute have found Congress intended to preempt state regulations, except as preserved by 45 U.S.C. § 434. *See Donelon v. New Orleans*, 474 F.2d 1108 (5th Cir. 1973), *cert. denied*, 414 U.S. 855 (1973), where Louisiana parish officials were found without authority under the FRSA to require a railroad to meet any safety standard beyond those contained in the national act. *See also, National Association of Regulatory Commissioners v. Coleman, supra.*

The law, cases and logic all show overwhelmingly that the federal regulatory scheme has preempted the field of railroad safety. In drafting 45 U.S.C. § 434, however, two exceptions were carved out, allowing state regulations in certain limited circumstances. The first exception is that state regulation may continue in force until such time as federal regulations covering the same subject have been adopted. The subject of the train speed has *exhaustively* regulated as a result of the FRSA. The Federal Railroad Administration established and adopted train speed regulations in conjunction with the adoption of the track and roadbed standards in 1971 (49 C.F.R., Part 213) and with the adoption and revision of signal standards previously enacted under authority of the Signal Inspection Act in 1968 (49 C.F.R., Part 236).

It is clear that the composite purpose of these regulations is to establish standards for safe train speeds based on sound engineering principles. It can also be said that while grade crossing locations are all different, the danger of car/train collisions are essentially generic, not "unique" as implied by Fenton. The requirements set forth in 49 C.F.R., Part 213, represent minimum track safety standards which "...indicate a Congressional determination to regulate the entire railroad area." *Black v. The Baltimore and Ohio Railroad Co.*, 398 N.E. 2d 3161 (Ind. C.A. 1980). In these regulations, the FRA has established safe operating speeds between

10 miles per hour and 110 miles per hour with classifications (Class 1 through Class 6) determined by the condition and/or curvature of the track and roadbed. 49 C.F.R. § 213(a); 49 C.F.R. 213.57 Appendix A. If the condition and/or curvature of the track and roadbed is such that a train cannot operate safely at a given speed, the train speed must be reduced to a point where the train can operate safely. To confirm speed limits are within the operational boundaries both railroads and federal inspectors routinely monitor and inspect track conditions. The railroad must also maintain a timetable on file with the Federal Railroad Administration (FRA) with explicit speed limits in relation to specific mileage or track territories. In the event such timetable speeds are excessive relative to the federal rules, regulations and standards, the FRA can implement by order a lower speed limit.

Fenton's brief contains a partial summary of the applicable rules and standards. It ignores that C.F.R. 213.9 is entitled "*Operating Speed Limits*". It is Fenton's position that because the Secretary of Transportation has not issued an order to the effect "Train speed in Fenton is 50 mph" that no federal "rule, regulation, standards or laws" exist. This position is fatally flawed insofar as the exhaustive engineering and speed categories contained in the Code of Federal Regulations are in direct contradiction with petitioner's assertion.

Clearly, to the extent practicable the FRSA plan controls train speeds. No regulatory system could be formulated to set track speed city by city, mile by mile through the United States and Congress never intended such a system. The suggestion that the law only concerns derailment is completely unsupported. Fenton has no support for their attempt to portray the *Operating Speed Limits* as solely related to derailments.

Their argument is directly and dispositively addressed by the case *Easterwood v. CSX Transportation Company*, 933 F.2d 1548

(11th Cir. 1991). In that case, a widow of a decedent who was killed in a crossing accident sued the railroad for negligence, alleging, among other things, that the train speed was excessive, although it was within federally established limit. The appeals court upheld the trial court's summary disposal of that claim and further ruled that the FRSA speed limits are by no means limited to derailment concerns and that it is not relevant to the existence of preemption. On speed limits, the court said,

> We note that the question of train speed has been addressed by Congress through the Secretary of Transportation. The Secretary has established regulations governing the maximum speed for passenger and freight trains on various classes of track. See 49 C.F.R. 213.9 (1990). *We therefore find this claim to be preempted since Congress has stated that as soon as the Secretary has established a safety regulation all state regulations governing the same area are preempted.*

Id. at 1553.

They continued on the issue of speed laws being limited to non-grade crossing standards,

> Easterwood first argues that preemption is inappropriate because the speed limits were not adopted in order to minimize the number of grade crossing accidents. Easterwood notes that the various speed limits found in 49 C.F.R. 213.9 (1990) are related to the class of track and the curve of the track . . . that sections of track are classified on the basis of several factors including the track ballast . . . the

> number of quality of the cross ties . . . etc. Easterwood points to these factors and notes that the speed limits are not related to the density of the surrounding population. Easterwood, therefore, concludes that the Secretary adopted the speed limits to prevent derailments and not to prevent grade crossing accidents. However, the Supreme Court held in Florida Lime & Avocado Growers, Inc. v Paul, 373 U.S. 132, 142, 83 S. Ct. 1210, 1217, 10 L. Ed. 248 (1963), that it is irrelevant to preemption analysis whether the state law's objectives are similar to or different from the federal law's objectives. Preemption analysis turns on Congress' intent to preempt state law and on the nature of the federal regulations. Moreover, Easterwood does not point to any legislative history for the speed limits and therefore she asks us to guess at the motives behind the Secretary of the Treasury. Such guessing is inherently suspect. While Easterwood assumes that the speed limits are designed to prevent derailments, it is equally valid to assume that the speed limits were set low enough that, in conjunction with adequate grade crossing signals and gates, the speed limits were intended to lessen the number of grade crossing accidents as well as lessen the chances of derailments.

Id. at 1553 and 1554.

Fenton's position that population density is a dispositive element on supporting local train speed ordinances as unique local safety "hazards" and "track standards in isolation" is without substance.

The United States Supreme Court let stand an appellate court decision which had ruled that the FRSA preempted a Texas statute requiring cabooses on all trains. Cabooses are never even addressed in the FRSA but still the state law fell. *See Missouri Pacific Railroad v. Railroad Commission of Texas,* 850 F.2d 264 (5th Cir. 1988), *cert. denied,* 109 S. Ct. 794 (1988). The case shows that even state laws must give way to the FRSA when in conflict and not within the statutory exceptions. This Court also refused review of *CSX Transportation Inc. v. Public Utilities Commission of Ohio,* 901 F.2d 497 (6th Cir. 1990), *cert. denied,* 111 S. Ct. 781 (1991). In that case the Court found that state hazardous materials transportation laws were in conflict with the FRSA regulations and, therefore, were preempted.

As to the FRSA's effect on existing ordinances, it is well established that an ordinance which is preempted by federal legislation or regulation is unconstitutional by virtue of the Supremacy Clause of the United States Constitution (Art. VI, cl. 2). Giving all presumptions in favor of the city-non-movant pursuant to rules regarding motions for summary disposition, the court made the only decision the law allowed him to make.

Fenton's repeated and unfounded reliance on the archaic decision in *Erb v. Morasch, supra,* is patently erroneous and displays an unfamiliarity with the nature of constitutional law. It is a proposition unassailable that the Congress can legislate or regulate a subject subsequent to a Supreme Court decision on the same subject. The petitioner's theory that the court's recognition in 1900 of local speed ordinances precludes subsequent congressional legislative action is both novel and wrong. *Erb* itself limits its ruling by the phrase, *"until at least Congress shall take action in the matter." Supra* at 588. Well, Congress has by passing the FRSA. Time hasn't stopped, even in Fenton, and the horse and buggy days with their parochial economics is long gone.

It is clear from the engineering detail, categorization of track conditions, and explicit speed restrictions that the specific subject of train speed is now covered by "rule, regulation, order or standards" promulgated by the federal government. This specifically excludes conflicting state or local regulations that may have been enacted and that don't fit into another section of the 45 U.S.C. § 434 exceptions.

The provisions of the FRSA are clear and unambiguous. The use of the term "state" is not obscure, vague or capable of raising a serious question of definition. Fenton contends they have been cloaked with the state's authority by virtue of their interpretation of certain Home Rule Cities Act provisions, specifically M.C.L.A. 117.4(h); M.S.A. 5.2081.4(h) which substance allows cities to control public streets.

The second exception under § 434 provides that more stringent state regulations may continue to force even when federal regulations covering the same subject have been adopted, provided three criteria have been met:

> 1. the regulation is necessary to eliminate or reduce an essentially local safety hazard;
>
> 2. the regulation is not incompatible with any federal regulation; and
>
> 3. the regulation does not create an undue burden on interstate commerce.

See Donelon v. New Orleans Terminal Company, supra.

Only in rare instances, arising from unique local situations, can a state regulate train speeds.

That the term "State" utilized in the local safety hazard exception of § 434 does not include municipalities is clear from the legislative history of the FRSA. That history reflects that Congress fully considered and knowingly rejected the idea of allowing municipalities, in addition to states, to regulate local safety hazards. Specifically, Congress refused to permit the type of state/municipal regulation contained in the Natural Gas Pipeline Safety Act which permits both a state agency *and* a municipality to continue regulating intrastate pipeline transportation safety either through certification or by agreement with the Secretary of Transportation. 49 U.S.C. §1674(a)(b). Violations of these state/municipal regulations are violations of the Natural Gas Pipeline Safety Act, provided the state/municipal regulations are not more stringent than the federal regulations, 49 U.S.C. § 1686(f). In examining and rejecting this system of state and municipal participation in regulating rail safety, Congress declared that:

> The characteristics of the distribution of gas through pipelines . . . is quite different from that of transportation of goods and materials by railroads . . . With the exception of industrial plant railroads, the railroad industry has very few local characteristics. Rather, in terms of its operations, it has a truly interstate character calling for a uniform body of regulation and enforcement. It is a national system. . . . *To subject a carrier to enforcement before a number of different state administrative and judicial systems in several areas of operation could well result in an undue burden on interstate commerce.* Consequently, it is the judgment of the committee that the nature of railroad operations requires a different system of regulation and enforcement from that which was effected for natural gas pipeline safety.

1970 *U.S. Code Cong. & Admin. News*, 4108.

It is the inescapable conclusion from this language that Congress *considered and rejected* joint state/municipal authority to legislate train safety laws and that the explicit grant of regulatory authority was restricted to and vested solely in states. Plain language must be taken at face value and accorded its normal and common definitions. Our Congress is not so devoid of semantic knowledge that they confuse "state" with "municipal", or use the two interchangeably.

The purpose of the FRSA is to promote rail safety and reduce rail accidents. 45 U.S.C. § 421. Since Congress determined that ". . . safety in the nation's railroads would not be advanced by subjecting the national rail system to a variety of enforcement and conflicting requirements in 50 different jurisdictions . . .", Congress enacted § 434 of the Act. *National Association of Regulatory Utility Commissions, supra*, 452 F.2d 11, at 13-14; 1970 *U.S. Code Cong. & Admin. News*, 4109. Clearly, the purpose of § 434 is to eliminate, not encourage, a multitude of nonuniform rail safety standards.

No court that has reviewed the question of local government or municipal authority to regulate train speed or any other aspect of train safety has found the word "state" broad enough to imply delegatory powers to cities. The most recent findings on this point is in the case of *CSX v. City of Thorsby, Alabama*, 741 F. Supp. 889 (M.D. Ala. 1990). They quickly cut through the argument by a city that they are standing in the shoes of the state in enacting a 25 mph train speed ordinance. The court states,

> Thorsby argues that it enacted its train speed regulation on behalf of the state. Thorsby's argument does not wash. The ordinance being challenged here was passed by the City of

> Thorsby and not by the State of Alabama. It is thus a city ordinance and not a state law or regulations which is at issue. The fact that the city may have acted or delegated authority does not detract from this dispositive fact.

Id. at 891. *All* courts examining the issue have ruled the same way.

It must be pointed out quite clearly that Fenton has shown *no* authority for their position. Not one case. They have a bureaucrat's now recanted affidavit and a legislative highlight to a bill that didn't pass as drafted, regarding a law the state couldn't enforce if it did pass. Michigan did act and it is exactly opposite the Fenton position.

In Michigan, however, municipalities no longer have even the pretense of statutory authority to regulate freight train speed. The statute which cities used to rely on in regulating train speed was M.C.L.A. 91.6, M.S.A. 5.1745 which, in pertinent part, read as follows:

> The council shall have the power to . . . require and compel railroad companies to keep flagman or watchman at all railroad crossings of streets, and to give warning of the approach and passage of trains thereat, and to light such crossings during the night; to regulate and prescribe the speed of all locomotives and railroad trains and street railway cars within the city; but such speed shall not be required to be less than six (6) miles per hour; and to impose a fine of not less than five (5) nor more than fifty (50) dollars, upon the company, and upon any engineer or conductor, violating any ordinance regulating the speed of trains.

This statute was revised in 1984 and bears significant differences from the previous statute. It now reads as follows:

> Section 5.1745. Railroad crossing grades; flagmen; speed of train. Section 6. The council [may] provide for and change the location and grade of street crossings of any rail track; compel any railroad company or street railway company to raise or lower [its] railroad track to conform to street grades which may be established by the city; construct street crossings in [a] manner and with [the] protection to persons crossing [at those crossings] as the council may require and to keep [those crossings] in repair [and] require and compel railroad companies to keep flagmen or watchmen at all railroad crossings of streets and to give warning of the approach and passage of trains [at those crossings] and to light [those] crossings during the night. [On and after the effective date of a passenger railroad maximum speed limit specified in a final order of the director of the state transportation department, an ordinance of a city prescribing the maximum speed limit of locomotives used in passenger train operations or of passenger railroad trains shall not be enforceable as to a speed limit other than the limit set forth in the order.]

The thrust of the new version with regard to train speed, eliminates any reference to city authority to regulate train speed, whether freight or passenger trains. All reference to freight trains has been deleted. This is no mere oversight. It reflects the measured judgment of the legislature, which eliminated the previous

statutory language " . . . to regulate and prescribe the speed of all locomotives and railroad trains . . ." If the legislature intended to vest authority in municipalities to control freight train speed, they would have mirrored the all inclusive language of the predecessor statute. The new version of the statute also vests the sole authority to issue orders regulating passenger train speed to the Michigan Department of Transportation. In effect, the new statute reserves authority solely to the state. This conforms to the dictates of 45 U.S.C. § 434, which also restricts regulation of local safety hazards solely to the state.

The precise issue of whether a municipality could continue regulating under the "local safety hazard" exception to § 434 of the FRSA was addressed in *Donelon v. New Orleans Terminal Co., supra.* This case held that Jefferson Parish, Louisiana officials could not regulate track standards of the New Orleans Terminal Company since such standards are regulated by the FRA in 49 C.F.R., Part 213, which also regulates train speed. The court stated: "the Railroad Safety Act, however, speaks of an exception for 'States' " *Id.* at 1112. "[T]hese individual officials [of Jefferson Parish] are without authority under the Federal Railroad Safety Act of 1970 to require the Railroad to meet any safety standard beyond those provided for in the national Act." *Id.* at 113.

Fenton has proffered this argument: That the Home Rule Cities Act empowers the city to control it streets, that the Michigan Constitution enshrines these powers as inviolable, and the the FRSA is therefore preempting, not a single local speed ordinance but the whole state constitution and the Home Rule Cities Act. This is an amazing position.

All cities are creatures of the states. They cannot be granted more power than a state has. In preempting the field the federal government simply does not allow state delegation of this power to a municipality so the state cannot give what they do not have.

Fenton repeatedly emphasizes the case *Wisconsin Public Intervenor v. Mortier*, 501 U.S. __, 111 S. Ct. 2476, 115 L. Ed. 2d 46 (1991) as authority that the use of the word "state" in federal legislation automatically implies "local governments" can be substituted for "state". The Michigan Supreme Court adequately distinguishes the cases, however, in short these basic differences exist. First, the FRSA states unambiguously in 45 U.S.C.A. § 421 that it is taking over the whole field of railroad safety wherever practicable and with no mention of a state/local concurrent power structure. The Federal Insecticide, Fungicide and Rodenticide Act (FIFRA) 7 U.S.C.A. § 136 *et seq.* has no such all inclusive statement of purpose and does in its body refer to some local input or contacts.

More telling, however, is *Mortier* involved no direct federal law conflicting with the local law. Our case does! Train speeds are a matter of explicit federal law at 49 C.F.R. 213.9. This is critical and determinative. Fenton's speed law cannot co-exist with the specific federal speed law, *Mortier* simply doesn't apply.

In addressing the final requirement of the "local safety hazard" exception in 45 U.S.C. § 434, any state speed regulation must not create "an undue burden on interstate commerce". The classic formulation of the Commerce Clause test is set forth in *Southern Pacific Co. v. Arizona*, 325 U.S. 761 (1945). *Southern Pacific* requires courts to balance the benefit to local safety which the challenged ordinance provides against the burden upon interstate commerce which it imposes. Generally speaking, the means used to ensure local safety must be appropriate to the ends sought and also must have the least impact on interstate commerce as is necessary to correct legitimate local safety problems.

It requires little imagination to assess the resulting burden on interstate commerce of a multitude of arbitrary, differing and changing speed rules imposed on train speeds by local governments. Trains take miles to adjust speeds up or down. The

effect of a local speed, whether published by the railroad or statute, requires a train crew to slow a train long before it would enter a specific city. In Wayne County, Michigan, a train conceivably can pass through ten cities in one half hour and be subject to ten different speed limits. Effectively trains would all slow to under 25 mph. This is the exact problem Congress intended to correct.

CONCLUSION

The trial court properly granted summary disposition and in enjoining Fenton's ordinance. The Michigan Court of Appeals properly affirmed that ruling as did the Michigan Supreme Court by unanimous vote.

For these reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

GREGORY A. ROBERTS
Attorney for Respondent

APPENDIX A — RULE 29.1 LIST OF SUBSIDIARY COMPANIES

RULE 29.1 LIST OF SUBSIDIARY COMPANIES

The following is a list of domestic companies in which Grand Trunk Western Railroad Company owns a whole significant or controlling interest:

Domestic Three Leasing Corporation

Domestic Four Leasing Corporation

APPENDIX B — RULE 29.1 LIST OF PARENT COMPANIES AND THEIR SUBSIDIARIES

RULE 29.1 LIST OF PARENT COMPANIES AND THEIR SUBSIDIARIES

The Grand Trunk Western Railroad Company is a wholly owned subsidiary of the Grand Trunk Corporation, which, in turn is wholly owned by the Canadian National Railroad.

The following is a list of domestic and foreign companies in which the Grand Trunk Corporation or the Canadian National Railroad owns a whole, significant or controlling interest:

CONSOLIDATED COMPANIES

Autoport Limited

Canac International Inc.

Canac International Ltd.

The Canada and Gulf Terminal Railway Company

Canadian National Express Company

Canadian National Railway Company

The Canadian National Railways Securities Trust

Canadian National Steamship Company, Limited

Canadian National Telegraph Company

Appendix B

Canadian National Transfer Company Limited

Canadian National Transportation, Limited

The Canadian Northern Quebec Railway Company

Canat Limited

Canaven Limited

Central Vermont Railway, Inc.

Chapman Transport Limited

CN Exploration Inc.

C.N. (France) S.A.

CNM Inc.

CN Tower

CN Transactions Inc.

Duluth, Winnipeg and Pacific Railway Company

E.I.D. Electronic Identification Systems Ltd.

Empire Freightways Limited

Grand Trunk Corporation

Appendix B

Grand Trunk Land Development Corporation

Grand Trunk Technologies, Inc.

Grand Trunk Western Railroad Company

The Great North Western Telegraph Company of Canada

The Minnesota and Manitoba Railroad Company

The Minnesota and Ontario Bridge Company

Mount Royal Tunnel and Terminal Company, Limited

The Northern Consolidated Holding Company Limited

173335 Canada Inc.

The Quebec and Lake St. John Railway Company

Royal Transportation Limited

JOINTLY-OPERATED AND OTHER COMPANIES IN WHICH THE SYSTEM HAS INVESTMENTS

The Belt Railway Company of Chicago

The Canada Southern Railway Company

Canaprev Inc.

Compagnie de gestion de Matane Inc.

Appendix B

Corporation de Chauffage Urbain de Montreal

Detroit River Tunnel Company

Dome Consortium Investments Inc.

Domestic Two Leasing Corporation

Eurocanadian Shipholdings Limited

Fort Point Holdings Ltd.

Halterm Limited

Innotermodal Inc.

Lakespan Marine Inc.

Portage & Main Development Ltd.

Railroad Association Insurance, Ltd.

Seabase Limited

Shawinigan Terminal Railway Company

Societe du port ferroviaire de Baie Comeau-Hauterive

Telesat Canada

The Toronto Terminals Railway Company Limited

Appendix B

TTX Company

In addition, the property of the Canadian Government Railways is entrusted to the Canadian National Railway Company as part of the System.

Supreme Court, U.S.
F I L E D
SEP 11 1992
OFFICE OF THE CLERK

NO. 91-2004

IN THE

SUPREME COURT OF THE

UNITED STATES

October 1991 Term

CITY OF FENTON,

a Michigan Municipal Corporation,

Petitioner,

v

GRAND TRUNK WESTERN RAILROAD COMPANY,

a Michigan Corporation,

Respondent.

SUPPLEMENTAL BRIEF TO PETITION FOR WRIT OF CERTIORARI TO THE MICHIGAN SUPREME COURT

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I. PARTIES TO THE PROCEEDING AND RULE 29.1 STATEMENT

The City of Fenton, Petitioner, is a Michigan Municipal Corporation that has no parent companies or subsidiaries.

Grand Trunk Western Railroad Company is a Michigan Corporation.

A Rule 29.1 List of Subsidiary Companies of Grand Trunk Western Railroad Company is found in Appendix A on page 1a of Respondent's Brief in Opposition and that Appendix is incorporated herein by reference.

A Rule 29.1 List of Parent Companies of Grand Trunk Western Railroad Company and Their Subsidiaries is found in Appendix B, page 2a of Respondent's Brief in Opposition and that Appendix is incorporated herein by reference.

II. MEMORANDUM OF LAW PURSUANT TO RULE 15.7

As a courtesy to this Honorable Supreme Court of the United States, your Petitioner, the City of Fenton, hereby calls to the Court's attention a new case that was not available at the time of the City of Fenton's last filing. On June 15, 1992 the City of Fenton filed its Petition for Writ of Certiorari and on June 29, 1992 this Court granted Certiorari in CSX Transportation, Inc. (United States Supreme Court No. 91-1206 and hereinafter referred to as Easterwood.)

In Easterwood, a man was killed when the truck he was driving was struck by a freight train operated by CSX Transportation, Inc. The spouse of the deceased filed a wrongful death action against CSX Transportation, Inc. The widow alleged that CSX was liable because

the train that struck her husband's truck was traveling at an excessive speed. The United States Court of Appeals was asked to determine the extent to which state law tort claims are preempted by the Federal Railway Safety Act (Easterwood, pages 1 and 2).

Kenneth W. Starr, Solicitor General of the United States, poignantly sets forth the issue before this Court in Easterwood on page (I) of his Brief for the United States Amicus Curiae:

> "Whether federal statutes and regulations setting speed limits for trains on all classes of track nationwide preempt a state law cause of action against a railroad for operating its train at an unreasonably excessive speed."

The issue in Easterwood is strikingly similar to the issue in City of Fenton v Grand Trunk Railroad Company (United

States Supreme Court No. 91-2004; hereinafter referred to as City of Fenton v Grand Trunk). Although the issue in City of Fenton v Grand Trunk has been variously stated by the parties; in essence, the question is whether federal statutes and regulations setting speed limits for freight trains preempt a municipal ordinance that seeks to prohibit an unreasonably excessive freight train speed at a crowded intersection that is a safety hazard.

It follows that both Easterwood and City of Fenton v Grand Trunk zero in on a common question concerning an exception to federal preemption.

One of the parts of 45 USC 434 that constitute an exception to preemption commonly relied upon by the Cross-Petitioner in Easterwood and the Petition in the City of Fenton v Grand Trunk is as follows:

"A State may...continue in force

any law...relating to railroad safety until such time as the Secretary has adopted a... regulation covering the subject matter of such state requirement."

The Cross-Petitioner in Easterwood argues that the federal regulation that the Secretary of Transportation has adopted has to do with "...how fast a train can travel and not derail..." (Respondent's Cross-Petition for Writ of Certiorari from the United States Court of Appeals for the Eleventh Circuit, page 5, line 15). The Petitioner in City of Fenton v Grand Trunk also contends that the subject matter for the federal regulation is derailment and points out that the federal regulation prescribes only "the initial minimum safety requirements for railroad track..." 49 CFR 213.1.

Further, the Code of Federal Regulations drafted by the Secretary of Transportation specifically indicate that the freight train speeds are not for crowded and dangerous crossings; but rather they are for "track conditions existing in isolation." (49 CFR 213.1). The interpretation of the meaning of 49 CFR 213.1 is beyond the scope of this Supplemental Petition and will no doubt be a subject of considerable study for the Solicitor General before he files his Brief in Easterwood. This writer feels certain that if an affidavit is sought from Andrew Card, Secretary of Transportation for the United States, it will become clear that the freight train speeds set by the Secretary of Transportation do not concern themselves with track in crowded or dangerous areas; but rather apply to principles of a safe train track to prevent derailment. Ultimately, the question of what 49 CFR 213.1, et. seq. means is a question of law and the

four squares of this regulation must be read and understood and ambiguous committee reports must be disregarded and the text should be given "...its fair meaning, whatever various committees might have had to say--thereby affirming the proposition that we are a government of laws not of Committee Reports." (As eloquently put by Justice Anthony Scalia in a case that is important to the instant quandary , Wisconsin Public Intervenor v Mortier, 501 US ___, 111 S Ct 2476; (1991) at page 2490, line 26).

The fact that the U.S. Supreme Court is reviewing Easterwood is particularly important to the City of Fenton because the Michigan Supreme Court based its decision to deny the relief sought in the City of Fenton's appeal upon the principles set forth by the U.S. Court of Appeals in Easterwood v CSX Transportation, Inc., 933 F 2d 1548 (11th Cir. 1991).

The Michigan Supreme Court quoted the following from the U.S. Court of Appeals Opinion:

> "While the appellant assumes that the speed limits are designed to prevent derailments, it is equally valid to assume that the speed limits were set low enough that, in conjunction with adequate grade crossing signals and gates, the speed limits were intended to lessen the number of grade crossing accidents as well as lessen the chances of derailments." (Petition for Writ of Certiorari to the Michigan Supreme Court page 13a).

The Michigan Court then ruled:

> "We find Judge Johnson's opinion in Easterwood to be soundly reasoned and persuasive, and we therefore conclude that the

Secretary of Transportation has covered the subject matter sought to be addressed by Fenton's ordinance." (Petition for Writ of Certiorari No. 91-2004.)

A considerable difficultly could arise if the U.S. Supreme Court were to not grant the City of Fenton's Petition for Writ of Certiorari and then rule in favor of the-Cross-Petitioner in Easterwood. All municipalities in Michigan by staré decisis and all municipalities throughout the United States by analogy to the Michigan Supreme Court ruling would be prohibited from enforcing freight train speed ordinances even though the U.S. Supreme Court would have indicated that the U.S. Court of Appeals was in error in finding preemption.

The consequences of this judicial

noose would be to lead to more unnecessary casualties at railroad crossings that are congested. Solicitor General Starr has aptly stated the safety problem as follows:

> "Railway grade crossing accidents are regrettably common, and thus continue to pose a serious threat to life and property. The Department of Transportation reports that in calendar year 1990 there were 5,022 motor vehicle accidents at railroad-highway crossings, resulting in 568 deaths and 2,186 injuries...This volume of accidents suggests that the underlying legal issues warrant review by this Court." (Brief for the United States As Amicus Curiae, page 12).

III. REQUEST TO DEFER DECISION ON CITY OF FENTON'S PETITION FOR WRIT OF CERTIORARI UNTIL AFTER EASTERWOOD IS DECIDED

The efficient administration of justi e would be enhanced by this Honorable Court if the Petition for Writ of Certiorari in City of Fenton v Grand Trunk was to be held back for decision until after Easterwood is decided. If the U.S. Supreme Court found that there was no preemption by the Federal Railway Safety Act in Easterwood, then the high court would be in a position to reverse and vacate the decision of the Michigan Supreme Court below and declare the City of Fenton's freight train speed ordinance to be constitutional without the need for briefs and oral argument.

It is important to note that in the event the high court determines that there

was preemption in Easterwood under the first exception to preemption, there still would remain the question of whether the City of Fenton came within the so called second exception to preemption which reads in pertinent part:

> "A state [**or a city by delegation of authority or leaving local regulation in the hands of local government according to Wisconsin Public Intervenor v Mortier, 501 US ___; 111 S Ct 2476 (1991) page 2478, line 4**] may adopt or continue in force an additional more stringent law...or standard relating to railroad safety when necessary to eliminate or reduce an essentially local safety hazard..." 45 USC 434.

Petitioner, City of Fenton, prays that the United States Supreme Court defer

decision on its Petition for Writ of Certiorari until after a decision has been reached in Easterwood.

_____

DOUGLAS J. CALLAHAN
Attorney for Petitioner
City of Fenton

Dated: September ___, 1992.